Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

TOM E. HARDEN, ET AL., PETITIONERS

v.

WILLIAM E. "BUSTER" FISHER, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether under the Fourth Amendment police officers detaining an individual who poses a danger to himself or others, who is believed to be armed and suicidal, must have probable cause to detain the individual, as opposed to *Terry's* reasonable suspicion standard.

PARTIES TO THE PROCEEDINGS

Petitioners are Morrow County, Ohio Sheriff Tom E. Harden, Morrow County, Ohio Sergeant Mark Leary, and Morrow County, Ohio Deputies Steve and Molly Alexander.

Respondents are William E. "Buster" Fisher and Doris Fisher.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Morrow County, Ohio Sheriff Tom E. Harden, Morrow County, Ohio Sergeant Mark Leary, and Morrow County, Ohio Deputies Steve and Molly Alexander ("Morrow County") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported as *Fisher v. Harden*, 398 F.3d 837 (6th Cir. 2005), It is reproduced in the Appendix at App. 1a. The opinion of

the District Court granting petitioners' motion for summary judgment is unreported and is reproduced in the Appendix at App. 42a.

JURISDICTION

The court of appeals judgment was entered on February 25, 2005. A timely petition for rehearing was denied on June 8, 2005. Appendix at App. 80a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourth Amendment to the United States Constitution provides that: "The right of the people to be secure in their persons...against unreasonable searches and seizures..."

STATEMENT

Petitioners seek review of the ruling of the Sixth Circuit Court of Appeals which held that police officers must have probable cause to detain a suicidal person who may be armed and poses a threat to himself or others, rather than the reasonable suspicion standard required by this Court in *Terry v. Ohio*, 392 U.S. 1 (1968).

Petitioners seek review of the Sixth Circuit's ruling because it is in conflict with the rulings of this

Court in *Terry v. Ohio*, 392 U.S. 1 (1968), *Minnesota v. Dickerson*, 508 U.S. 366 (1993), *Adams v. Williams*, 407 U.S. 143 (1972), and others. It is also in conflict with the rulings of several other circuits that do not consider the mental state of the suspect when considering the reasonableness of a police officer's actions and do not require a heightened standard of care for officers dealing with suicidal individuals. See *Pena v. Leombruni*, 200 F.3d 1031 (7th Cir. 1999); *Wood v. City of Lakeland*, 203 F.3d 1288 (11th Cir. 2000); *Nelson v. County of Wright*, 162 F.3d 986 (8th Cir. 1998); *United States v. Wallace*, 889 F.2d 580 (5th Cir. 1989).

The petition arises out of a civil rights action brought by William E. "Buster" Fisher and his wife, Doris Fisher following a July 10, 2000 "Terry" stop in Morrow County, Ohio. The facts were undisputed. On July 10, 2000, Morrow County Sheriff's deputies received a 9-1-1 dispatch of a possible suicide with a man reportedly tied to the railroad tracks. The deputies proceeded to the call with lights and sirens and a rescue squad was dispatched to serve as a standby at the scene.

Deputies arrived to find a man approximately 150 to 200 yards away sitting in the middle of the tracks with a high powered rifle. The deputies knew nothing about this man. The man did not appear to be hunting. Like the deputies, two separate passers-by who reported the man to 9-1-1 thought he was attempting to commit suicide. The deputies took cover behind the cruiser and instructed the man over the PA to lay down the rifle. The man began walking toward the deputies and would not/did not lay down the rifle until the third or fourth command. As he walked closer, the deputies

observed the man bend down as if to pick something up off the tracks. As the man got closer, deputy Steve Alexander saw firearm shells or ammunition protruding from the man's clothes and did not know if the man had another firearm on him. The man repeatedly failed or refused to follow the deputies' instruction and offered no explanation for his unusual activity.

Deputy Steve Alexander was aware of other individuals committing suicide by sitting on railroad tracks and one year prior there had been a similar suicide in Morrow County, Ohio. It is undisputed that the deputies did not use any force whatsoever on Mr. Fisher. Mr. Fisher was taken off the railroad tracks, handcuffed and told to lay down for a brief period of time and was about to be searched for weapons and asked why he was sitting on the railroad tracks when he appeared to be in distress. The police officers then rendered medical assistance to the man.

On August 26, 2002, after a year of discovery in the federal case, the U.S. District Court for the Southern District of Ohio granted summary judgment to all of the Morrow County defendants, finding that the deputies acted in accordance with *Terry v. Ohio*, 392 U.S. 1 (1968) in their encounter with Buster Fisher.

Buster Fisher appealed the decision of the Southern District of Ohio to the Sixth Circuit Court of Appeals. There, the Sixth Circuit reversed the decision of the Southern District of Ohio, and held that police officers must have probable cause to detain a suicidal person even if he or she poses a threat to himself, the police officers, or others, rather than the reasonable

suspicion standard required by this Court in *Terry v. Ohio*, 392 U.S. 1 (1968). The Sixth Circuit subsequently denied a petition for rehearing en banc filed by Petitioners.

REASONS FOR GRANTING OF THE PETITION

A. The Decision in the Court Below Creates a Split Between the Circuits

The Sixth Circuit's decision creates a direct conflict with the decisions of at least four other circuits that do not consider the mental state of the suspect when considering the reasonableness of a police officer's actions in dealing with an individual who may be armed and do not require a heightened standard of care for officers dealing with suicidal individuals. Prior to the Sixth Circuit's ruling, *Wood v. City of Lakeland*, 203 F.3d 1288 (11th Cir. 2000) analyzed a police shooting of a suicidal teenager with no consideration of police failure to employ techniques for dealing with suicidal subjects. *Pena v. Leombruni*, 200 F.3d 1031 (7th Cir. 1999) found that the mental state of the subject was irrelevant to the reasonableness of an officer's actions in shooting the subject. In *Nelson v. County of Wright*, 162 F.3d 986 (8th Cir. 1998) the court did not consider the disturbed mental state of the subject where a police officer was granted qualified immunity in the shooting of a suicidal man. *United States v. Wallace*, 889 F.2d 580 (5th Cir. 1989) held that a police officer may conduct a stop and frisk of an individual when he has a reasonable suspicion that the individual is about to commit suicide and that the individual possesses a firearm, much like the Buster Fisher situation here. The Fifth District states in *Wallace* that "it would have

been poor police work indeed" for police to have left the scene after learning that the individual had a gun and was threatening suicide. *Wallace*, 889 F.2d at 528, citing *Terry*.

Wood, *Pena*, *Nelson*, and *Wallace* all correctly concluded – with appropriate citations to *Terry v. Ohio*, 392 U.S. 1 (1968), *Tennessee v. Garner*, 471 U.S. 1 (1985), and other relevant decisions of this Court – that the mental state of the individual being detained or arrested is irrelevant to a determination as to the reasonableness of a police officer's actions. *Wood*, 203 F.3d 1292; *Pena*, 200 F.3d 1033; *Nelson*, 162 F.3d 990 *Wallace*, 889 F.2d at 582. Reasonable suspicion is the standard that applies to a *Terry* stop, and the Sixth Circuit erred when it held that a probable cause standard applies to officers detaining an individual believed to be armed and suicidal and who poses a danger to the police officers or others.

In addition to the incorrect decision of the Sixth circuit, the Eighth and Ninth circuits have concluded that the mental state of the individual being detained or arrested is relevant to the reasonableness of a police officer's actions. See *Ludwig v. Anderson*, 54 F.3d 465 (8th Cir. 1995); *Deorle v. Rutherford*, 272 F.3d 1272 (9th Cir. 2001).

In short, the decision of the Sixth Circuit Court of Appeals creates a serious circuit split.

B. The Court of Appeals' Decision Undermines this Court's Decision in *Terry v. Ohio* and Others.

The decision of the Sixth Circuit in this case provided an erroneous answer to the important question of whether a heightened burden applies to a police officer's detention of a suicidal suspect posing a danger to himself or others. The four other circuits that have addressed this question, discussed above, have correctly analyzed these issues without finding that the mental state of an individual should become part of the analysis as to whether a police officer's actions are reasonable. Two other circuits, the eight and ninth circuits, have decided along the same lines as the sixth circuit. Therefore, this Petition should be granted to resolve the split between the circuits and make clear that a police officer need not investigate or analyze the mental state of a subject in making his or her decisions related to the arrest or detention of an individual who may pose a danger to the police officers or others before patting down the individual for weapons.

In *Terry v. Ohio*, 392 U.S. 1 (1968), this Court recognized an exception to the warrant clause of the Fourth Amendment which allows police officers to conduct a search of a person for a weapon even in circumstances where the police officer may not even have probable cause to arrest the individual for a crime:

> The crux of this case, however, is not the propriety of Officer McFadden's taking steps to investigate petitioner's suspicious behavior, but rather, whether there was justification for

> McFadden's invasion of Terry's personal security by searching him for weapons in the course of that investigation. We are now concerned with more than the government interest in investigating crime; in addition, there is the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him. (Emphasis supported).

Terry v. Ohio, 392 U.S. at 24. See also: *Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993); *Adams v. Williams*, 407 U.S. 143, 147 (1972). Indeed, this Court has held, as a matter of law, that when police officers receive specific information indicating that a person has a weapon, there is justification for a pat down search. *Adams v. Williams*, 407 U.S. 143 (1972).

As this Court explained in *Terry*, 392 U.S. at 13, "[e]ncounters are initiated by the police for a wide variety of purposes, some of which are wholly unrelated to the desire to prosecute for crime." Further, the fact that an officer may not suspect an individual of criminal activity does not render such a seizure unreasonable per se as *Terry* only requires "specific and articulable facts which...reasonably warrant [an] intrusion" into the individual's liberty. *Terry*, 392 U.S. at 21.

The Sixth Circuit's primary error was to hold that the Morrow County, Ohio officers did not have a right to conduct a pat-down or *Terry* stop of Buster Fisher, absent probable cause, even though Buster Fisher was armed with a high-powered rifle, had other

ammunition protruding from his clothing and was not obeying police commands, and was reportedly suicidal. This decision was completely inconsistent with *Terry v. Ohio*, 392 U.S. 1 (1968) and *Adams v. Williams*, 407 U.S. 143 (1972). The Court of Appeals interprets the *Terry* test to mean that a police officer – in jurisdictions in which suicide is not a crime, as is the case in Ohio, *State v. Sage*, 31 Ohio St. 3d 173 (Ohio 1987) – may not conduct an investigatory stop of an individual when the officer has a reasonable suspicion only that the individual is about to commit suicide (but not engage in an actual criminal activity). Applying that interpretation of *Terry*, the Court of Appeals held that deputies must instead have probable cause to detain a suicidal person who poses a threat to himself or others.

The Court of Appeals erred when it mistakenly held that officers detaining an individual believed to be suicidal must have "probable cause to believe that the person is dangerous to himself or others." Therefore, in its mistaken view, individuals who pose a danger to themselves or others, but happen to be suicidal, as opposed to committing a crime, are granted a higher level of protection because a police officer must have probable cause to detain them, not simply a reasonable suspicion. In other words, the general public is less protected from individuals with a questionable mental state than those without.

This Court has never held that the standards outlined in *Terry v. Ohio* and *Adams v. Williams* are dependent upon the mental state of the person being detained. A grant of this Petition for Certiorari is particularly important because the Sixth Circuit's holding and rationale, if its opinion stands, requires any

court that applies it to forego this Court's mandate in *Terry*, which has existed for nearly four decades, and apply a heightened standard of scrutiny when an officer detains a possibly armed individual with a questionable mental state.

The Sixth Circuit's decision effectively limits this Court's decisions in *Terry*, *Adams*, and others, by requiring that probable cause, not reasonable suspicion, exist for a police officer to detain a person whom the officer believes poses a danger to himself or others if that person has a questionable mental state or is suicidal. Additionally, the Sixth Circuit's holding poses new burdens upon police officers themselves, specifically, to be able to assess, often in the context of mere seconds, whether a suspect in fact has a questionable mental state or is suicidal.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

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(any footnotes trail end of each document)
No. 02-3996

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILLIAM E. "BUSTER" FISHER, et al.,
Plaintiffs-Appellants,

v.

TOM E. HARDEN, in his official capacity as Sheriff of Morrow County, Ohio, et al.,
Defendants-Appellees.

June 11, 2004, Argued

February 25, 2005, Decided

February 25, 2005, Filed

COUNSEL: ARGUED: James D. McNamara, Columbus, Ohio, for Appellants.

Douglas J. Suter, ISAAC, BRANT, LEDMAN & TEETOR, Columbus, Ohio, for Appellees.

ON BRIEF: James D. McNamara, Columbus, Ohio, for Appellants.

Douglas J. Suter, ISAAC, BRANT, LEDMAN & TEETOR, Columbus, Ohio, for Appellees.

JUDGES: Before: KEITH, CLAY, and GIBBONS, Circuit Judges. KEITH, J., delivered the opinion of the

court, in which CLAY, J., joined. GIBBONS, J., delivered a separate dissenting opinion.

OPINIONBY: DAMON J. KEITH

OPINION:

DAMON J. KEITH, Circuit Judge. The Plaintiff-Appellant, William E. "Buster" Fisher, filed a complaint on December 4, 2000, in which, pursuant to 42 U.S.C. § 1983, he charged the Defendants-Appellees, Sheriff Tom E. Harden, Deputy Stephen Alexander, Deputy Molly Alexander, and Deputy Mark Leary (collectively "the Defendants"), with having violated his right against an unreasonable seizure as guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution. On May 9, 2002, the Defendants filed a joint motion for summary judgment. The district court subsequently issued an opinion and order on August 6, 2002, in which it granted the Defendants' request for a summary judgment on the grounds that (1) they had a reasonable suspicion that Fisher was suicidal, and, as a consequence, their actions in affecting a seizure of Fisher were protected by the doctrine of qualified immunity, and (2) there was no genuine issue of material fact on Fisher's claim that the County failed to adequately train and supervise the deputies. In this appeal, Fisher asserts that the officers who seized him did not have probable cause to justify a mental health seizure, and that Harden failed to adequately train and supervise his deputies.[1] For the reasons set forth below, we REVERSE, in part, and AFFIRM, in part, the judgment of the district court.

FACTUAL BACKGROUND

The facts relevant to this cause occurred on the afternoon of July 10, 2000, in a rural farming area of Morrow County, Ohio. The area consists of wide open farming land, with heightened visibility in all directions. On that day, Fisher, a seventy-seven-year-old retired farmer, had gone out to shoot groundhogs, an activity in which he routinely engaged in an effort to help protect his neighbors' crops. Dressed in bib overalls, Fisher had taken with him a folding chair, his rifle, and a tripod that he used to help him aim his rifle and hold it steady. He positioned himself, sitting in the folding chair, upon an elevated railroad grade on one of his neighbor's property.

Fisher sat at a distance of approximately 250 yards from County Road 59, a rural road that runs through this area of Morrow County. A passerby noticed Fisher off in the distance sitting on railroad tracks and found his presence there quite unusual. Upon gathering that this was possibly a suicidal person, the passerby telephoned the Morrow County Sheriff's Department and reported, incorrectly, that a man had his feet tied to the railroad tracks. The Sheriff's Department subsequently dispatched a "Code 58," which indicates a possible suicide.

Two of the Defendants, deputies Stephen Alexander and Molly Alexander, who are husband and wife, responded to the dispatch. Upon their arrival on the scene, the officers located Fisher, who was still seated in his folding chair approximately 250 yards away. Mr. Alexander used the cruiser's microphone and speaker system to arouse Fisher's attention and instruct him to come toward the officers. Fisher stood up, gathered his belongings, and began walking along the railroad tracks

toward the officers. As Fisher proceeded toward them, the officers noticed he was carrying a rifle slung over his shoulder. They drew their firearms, crouched behind their open cruiser doors, and ordered Fisher to lay down the rifle before coming any closer. The officers acknowledged that initially Fisher appeared unable to hear their first command, and they responded with additional instructions for him to lay down his rifle. Upon hearing their command at a distance of nearly 200 yards away, Fisher readily complied with their request. The officers instructed Fisher further to lay down his folding chair and tripod. Again, once Fisher could hear their request, he readily complied.[2]

For the next couple of minutes, the officers observed Fisher walk toward the road, with nothing in his hands. As he walked deliberately toward them, it became apparent to Mr. Alexander that Fisher was an older gentlemen. The officers conceded that he approached them in a normal fashion, and did not act out or say or do anything out of the ordinary. Nonetheless, they kept their weapons drawn and trained upon him. As Fisher arrived at the road, Mr. Alexander directed him to walk backwards toward Mrs. Alexander. After he finally reached them, the officers commanded Fisher, still at gunpoint, to lay face down on the roadway, and handcuffed him behind his back.

Fisher immediately went into cardiac arrest. After unsuccessfully attempting to stand Fisher on his feet, the officers left him handcuffed and lying on the ground. Presumably unaware of the seriousness of Fisher's condition, Mr. Alexander immediately went to retrieve the objects that Fisher had placed on the ground. Shortly thereafter, a woman who lived nearby

and another Defendant, Deputy Mark Leary, separately arrived at the scene. The woman, who had been unable to attain sufficient attention from the Alexanders, informed Leary that Fisher suffered from a heart condition. Leary, observing Fisher's distressed state, uncuffed him, turned him on his back and called for medical assistance. Fisher was life-flighted to Riverside Hospital in Columbus, Ohio, for emergency care. Although Fisher survived, he is permanently disabled as a result of the incident.

Approximately five months later, to wit, December 4, 2000, Fisher filed a complaint against the Defendants in the United States District Court for the Southern District of Ohio. In the complaint, Fisher charges, among other things, that the officers violated his right, as guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution, to be free from unreasonable seizure without probable cause, and that Sheriff Tom Harden failed to adequately train and supervise his deputies. On August 6, 2002, the district court granted the Defendants' motion for a summary judgment. In doing so, the district court determined that the officers were entitled to qualified immunity because Fisher had failed to establish a constitutional violation, and that there was no genuine issue of a material fact to support his claim against Harden for a failure to train and supervise his deputies. This appeal followed.

DISCUSSION

This court conducts a de novo review of a district court's grant of summary judgment. Holloway v. Brush, 220 F.3d 767, 772 (6th Cir. 2000). Summary judgment is

proper only where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In considering such a motion, the court views the evidence in the light most favorable to the non-moving party and draws all reasonable inferences in favor of the non-moving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). To defeat a properly supported motion for summary judgment, an adverse party "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

Fisher raises two issues on appeal. First, he claims that because he pleaded facts sufficient to establish a constitutional violation, the district court erred in granting qualified immunity to the Defendants. Second, Fisher asserts that a genuine issue of material fact exists on his claim that Harden failed to properly train and supervise his deputies. We address each of these issues in turn.

I.

In his first point of error, Fisher contends that he has established a constitutional violation because the facts, as asserted by him, establish that the officers arrested him without the probable cause that is required to support a mental health seizure. The district court concluded that the officers did not need probable cause to justify their seizure of Fisher, but only needed reasonable suspicion that he was suicidal. Since the officers could point to articulable facts to support a reasonable suspicion that Fisher was suicidal, the district court determined that Fisher had failed to

establish a constitutional violation, and as a result the officers were entitled to qualified immunity.

Whether qualified immunity applies to an official's actions is a question of law that this court reviews de novo. Virgili v. Gilbert, 272 F.3d 391, 392 (6th Cir. 2001). Qualified immunity "is conceptually distinct from the merits of the plaintiff's claim." Mitchell v. Forsyth, 472 U.S. 511, 527, 86 L. Ed. 2d 411, 105 S. Ct. 2806 (1985). It is "an entitlement not to be forced to litigate the consequences of official conduct." *Id.* "The entitlement is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." Id. at 526.

In defining this entitlement, the Supreme Court has held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982). In 2001, the Court established a two-part test for determining whether qualified immunity applies. Saucier v. Katz, 533 U.S. 194, 201, 150 L. Ed. 2d 272, 121 S. Ct. 2151 (2001). In the initial inquiry, we must consider "this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Id.* If the facts, as alleged by the claimant, fail to establish a violation, then immunity applies. On the other hand, if the alleged facts sufficiently demonstrate a

constitutional violation, we must determine "whether the right was clearly established." *Id.*

A.

We address the threshold question of whether the facts alleged show the officers' conduct violated a constitutional right. Fisher argues that the officers violated his Fourth Amendment rights when they arrested him without the probable cause that is required to justify a mental health seizure. The district court, however, determined that the officers did not arrest Fisher but rather restrained him as a part of a *Terry* stop. *See* Terry v. Ohio, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968). In awarding qualified immunity to the officers, the district court analogized a mental health seizure to a criminal seizure, determining that "the same Fourth Amendment standards applicable to investigative stops and arrests for criminal activity apply as well to police investigations of persons who are reportedly mentally ill." J.A. at 28. As such, the district court determined that "even where probable cause is lacking, a police officer, pursuant to the guidelines applicable to a *Terry* stop, may investigate a report of a possibly suicidal individual where articulable facts indicate that the individual may present a danger to himself or to others." J.A. at 29. Inasmuch as the district court also believed that the officers had an articulable and reasonable suspicion that Fisher might harm himself or others, it held that the investigative stop did not violate the constitution. We disagree.

This case involves a seizure on the basis of an attempted suicide report. The Defendants do not

contest that Fisher was seized, but rather advocate that his seizure was valid as part of an investigative *Terry* stop. The Defendants, however, concede that they were not responding to a report of criminal conduct and that they never suspected that Fisher was engaged in or about to be engaged in a crime. Absent suspected criminal activity, in this circuit a law enforcement official may not physically restrain an individual merely to assess his mental health. Rather, we have established that in the context of a mental health seizure an officer must have probable cause to believe that the person seized poses a danger to himself or others. We analyze cases such as this under the probable cause standard announced by this court in Monday v. Oullette, 118 F.3d 1099, 1102 (6th Cir. 1997). Under that standard, officers detaining an individual believed to be suicidal must have "probable cause to believe that the person is dangerous to himself or others." *Id.*

In *Monday*, an officer responded to a radio dispatch that the plaintiff had telephoned a mental health worker and stated that he was upset over a divorce, had ingested some pills, and was drinking alcohol in an effort to commit suicide. When the officer entered the home, the plaintiff in fact was drinking alcohol and appeared intoxicated and depressed. The officer's count of the plaintiff's Xanax pills revealed that at least twenty were missing. Under those circumstances, we held that the officer "had probable cause to believe that [the] plaintiff was attempting to commit suicide, or at least might injure himself." *Id.*

A showing of probable cause in the mental health seizure context requires only a "probability or

substantial chance" of dangerous behavior, not an actual showing of such behavior. Id. (citing Illinois v. Gates, 462 U.S. 213, 245 n.13, 76 L. Ed. 2d 527, 103 S. Ct. 2317 (1983)). Just as actual innocence will not render invalid an arrest that is properly based upon probable cause that criminal activity was occurring, a mental health seizure can rest upon probable cause even when the person seized does not actually suffer from a dangerous mental condition. *Id.* Courts evaluate the existence of probable cause from the perspective of a reasonable and objective person in the position of the seizing official. *Id.* "If the circumstances, viewed objectively, support a finding of probable cause, [then] the arresting officer's actual motives are irrelevant." Criss v. City of Kent, 867 F.2d 259, 262 (6th Cir. 1988).

In this case, unlike in Monday, the Defendants are unable to demonstrate that they had probable cause to believe that Fisher was a danger to himself or others. The officers were responding to a dispatch that a man, who had tied himself to railroad tracks, might be attempting to commit suicide. When they arrived, they ordered Fisher to come to the road. His doing so immediately revealed that he was not tied to the railroad tracks as had been reported. This alone would have caused a reasonable officer to question the veracity of the attempted suicide report. When the officers noticed that Fisher had a rifle slung over his shoulder, they ordered him to put it down, and he complied. He proceeded towards them in a normal manner for an individual of his age. Unlike the officers in *Monday*, the Alexanders never questioned Fisher to determine if he might be depressed and attempting to commit suicide. Even after Fisher arrived at the road and it became apparent that he was a man of his later

years and dressed in hunting attire, the officers still did not make any inquiry of him, his purpose for being there, or the activity in which he was seemingly engaged at the time of their arrival. Instead, with their firearms continually trained upon him, they ordered Fisher to get face-down on the roadway and handcuffed him behind his back.

In addition, Fisher did not do anything that the officers considered to be suspicious or threatening. He did not carry his rifle in a ready position in his hands. He did not point it at the officers, himself, or anyone else. He put the rifle down when asked to do so and walked away from it, never turning back toward the gun. At the time he was handcuffed, the rifle lay on the ground roughly 200 yards away. The officers never saw Fisher in possession of any other weapon. Fisher was never verbally threatening, abusive, or irrational; he did not make any statements about hurting himself or anyone else; and he never attempted to avoid the officers or flee the area. Both officers admitted that Fisher did not do anything that made them afraid. In light of these circumstances, there are simply no facts from which a reasonable officer could have found a probability or substantial chance that Fisher posed a danger to himself or others at the time he was seized. Viewing the facts in the light most favorable to him, we find that Fisher has established a violation of his Fourth Amendment rights.

The Defendants urge us to adopt a rule that would apply the law of Terry v. Ohio to mental health seizures. Based on our precedent, we decline to do so, but such a rule would not apply to this case in any event. Even assuming, *arguendo*, that as part of an

investigatory detention officers were permitted to physically restrain a detainee in order to assess his mental state (and all in the absence of a reasonable suspicion of criminal conduct), this rule would not apply in the instant case because the force used by the Alexanders elevated their seizure of Fisher from a mere investigatory stop to an arrest. "Although an officer may have reasonable suspicion to detain a person or his possessions for investigation, the officer's investigative detention can mature into an arrest or seizure if it occurs over an unreasonable period of time or under unreasonable circumstances." United States v. Heath, 259 F.3d 522, 529-30 (6th Cir. 2001) (quoting United States v. Avery, 137 F.3d 343, 349 (6th Cir. 1997)). *See also* Weaver v. Shadoan, 340 F.3d 398, 408 (6th Cir. 2003) ("An investigative *Terry* stop may ripen into a *de facto* arrest through the passage of time or the use of force."); Feathers v. Aey, 319 F.3d 843, 851 (6th Cir. 2003) (determining whether an investigatory stop "escalated" into an arrest). If, through the passage of time or use of force, an investigative detention ripens into an arrest, "a suspect's continued detention *must* be based upon probable cause." Weaver, 340 F.3d at 408 (emphasis added). In determining whether a confrontation that began as a *Terry* stop has matured into an arrest, we assess "whether the use of force was reasonably related in scope to the situation at hand," Feathers, 319 F.3d at 851, or, likewise, whether "the length and manner of the investigative stop [was] reasonably related to the basis for the initial intrusion," Weaver, 340 F.3d at 408. "The investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." Florida v. Royer, 460 U.S. 491, 500, 75 L. Ed. 2d 229, 103 S. Ct. 1319

(1983).

Assuming that these principles are applicable to the present case, we would agree that the encounter here began as an investigatory stop incident to a suicide report. Nevertheless, in light of Fisher's compliance and because he did not take any sudden, unpredictable, or threatening action toward the officers, it is abundantly apparent that the seizure of Fisher quickly elevated into a full arrest. In assessing the use of force in this case, we conclude that the manner in which the deputies seized Fisher was not reasonably related to the basis of their initial intrusion. The Alexanders confronted Fisher on the basis of a report that he was suicidal. Mr. Alexander testified that his purpose in seizing Fisher was to determine whether he was suicidal - "to find out why he would have been depressed or what have you," J.A. at 298, and "to see if he was suicidal or see if he needed medical attention," *id.* at 301. Indeed, the district court similarly found that "it is true that when the deputies made contact with Mr. Fisher, they did so *solely* to investigate a possible suicide."*Id.* at 26 (emphasis added).

In his deposition, Mr. Alexander testified that he was familiar with the area and knew it to be an unincorporated rural area, where hunting routinely occurred and it is lawful for a citizen to be in public with a rifle. Fisher was wearing bib overalls with a small, homemade pouch for ammunition on the front. He had been holding a hunting rifle, seated in a folding chair, with a tripod to help steady and aim the rifle. He presented the appearance of an elderly man hunting in a location where hunters are commonly found.

Everything about Fisher's appearance, in that setting, suggested a benign encounter rather than a dangerous one.

Moreover, Mr. Alexander admitted that Fisher did not do anything that caused the officers concern subsequent to laying down his rifle. When asked, "Other than the normal caution that all police officers should exercise, you didn't see Mr. Fisher do anything that caused you to be fearful of him once he laid the gun down, did you?" *id.* at 299-300, Mr. Alexander responded, "I don't recall him doing anything, no," *id.* at 300.

Despite this acknowledgment that Fisher took no action that caused them to fear for their safety, the Alexanders forced Fisher face-down on the ground, at gun point, and handcuffed him. The deputies employed this force without any suspicion that Fisher was involved in criminal activity, without frisking him for other weaponry, and without asking him a single question. Based on our review of the record, we do not find that this use of force represented "the least intrusive means reasonably available to verify or dispel" the Alexanders' suspicion that Fisher was suicidal. We conclude that the use of force exceeded what was required for an investigative stop and that the manner in which the deputies seized Fisher constituted an arrest. In the absence of probable cause, such action violates the constitution.

In holding that Fisher has set forth a constitutional violation, we also conclude that the facts only support a violation by the Alexanders. We do not find that Leary committed any such violation. Indeed, all of the

evidence indicates that Leary essentially came to Fisher's rescue by removing his handcuffs and calling for emergency medical assistance. Hence, as to Leary, we agree with the district court that Fisher has not shown a constitutional violation.

B.

Next, we must determine "whether the right was clearly established." Saucier, 533 U.S. at 201. This second inquiry, "must be undertaken in light of the specific context of the case, not as abroad general proposition." *Id.* "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Id. at 202 (citation omitted). The relevant, dispositive inquiry is "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.*

"This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent." Anderson, 483 U.S. 635, 640, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (citation omitted). "An action's unlawfulness can be apparent from direct holdings, from specific examples described as prohibited, or from the general reasoning that a court employs." Feathers, 319 F.3d at 848 (6th Cir. 2003) (citing Hope v. Pelzer, 536 U.S. 730, 153 L. Ed. 2d 666, 122 S. Ct. 2508 (2002)). In determining whether a right is clearly established, we have concluded that "in the ordinary instance, . . . a district court must find binding precedent by the Supreme Court, its court of appeals or itself." Ohio Civil

Serv. Employees Assoc. v. Seiter, 858 F.2d 1171, 1177 (6th Cir. 1988). "A mere handful of decisions of other circuit and district courts, which are admittedly novel, cannot form the basis for a clearly established constitutional right in this circuit." Id. at 1177-78. We, however, also noted that in certain cases "it may be possible for the decisions of other courts to clearly establish a principle of law." Id. at 1177. In these exceptional cases, the decisions of other courts may provide clearly established law if the decisions "both point unmistakably to the unconstitutionality of the conduct complained of and [are] so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct, if challenged on constitutional grounds, would be found wanting." *Id.*

Applying these principles to the present case, we conclude that the right was clearly established. The specific question at issue is whether it was clearly established at the time of Fisher's arrest that a law enforcement officer may not affect a mental health seizure without probable cause. As we have already noted, in 1997 this court specifically held that "the Fourth Amendment requires an official seizing and detaining a person for a psychiatric evaluation to have probable cause to believe that the person is dangerous to himself or others." Monday, 118 F.3d at 1102. The seizure in this case was not specifically for purposes of a professional psychiatric evaluation. This difference, however, is of no effect.[3] Viewing the evidence in the light most favorable to Fisher, we must reject the sentiments of the dissent that the deputies were "merely securing the scene." Dissent at 14. First, we reiterate that the district court found that "it is true

that when the deputies made contact with Mr. Fisher, they did so solely to investigate a possible suicide." J.A. at 26. In addition, Mr. Alexander claimed that "if Mr. Fisher was a suicide risk and if [he] felt Fisher was in a mind set where he could be of risk to himself or others, [he] had the right under Ohio statute to take Mr. Fisher into protective custody."[4] Moreover, Fisher did not do anything that caused the officers to fear for their safety. *See id.* at 299-300. This record evidence reveals that the officers seized and detained Fisher, not merely to secure the scene, but for purposes of a mental health evaluation. Under our Fourth Amendment jurisprudence, that action requires probable cause.[5]

We have not found any case in which this court has stated that officers may restrain an individual's liberty on the sole basis that they have a reasonable suspicion that the individual suffers from a mental illness. In addition, the other circuits that have examined this issue have similarly held that probable cause is the correct standard. *See, e.g.*, Sullivan v. County of Hunt, Tex., 106 Fed. Appx. 215, 2004 WL 1636919 (5th Cir. 2004) (citing Anthony v. City of New York, 339 F.3d 129, 137 (2d Cir. 2003), a mental health seizure case in which the Second Circuit granted qualified immunity under the probable cause standard); Bailey v. Kennedy, 349 F.3d 731 (4th Cir. 2003)(officers must have probable cause to seize for emergency mental evaluation); Glass v. Mayas, 984 F.2d 55 (2d Cir. 1993) (requiring probable cause for involuntary hospitalization); Sherman v. Four County Counseling Ctr., 987 F.2d 397 (7th Cir. 1993) (requiring probable cause to detain for psychiatric evaluation); Gooden v. Howard County, Md., 954 F.2d 960 (4th Cir. 1992) (finding that it is clearly established that officers need probable cause for mental health

seizure); Harris v. Pirch, 677 F.2d 681 (8th Cir. 1982) (requiring good faith and probable cause for emergency commitment); In re Barnard, 147 U.S. App. D.C. 302, 455 F.2d 1370 (D.C. Cir. 1971) (requiring probable cause to detain person believed to be mentally ill and dangerous).

To support its position that the mere possession of a firearm by Fisher distinguishes the present case, the dissent cites Bell v. Irwin, 321 F.3d 637 (7th Cir. 2003), and United States v. Wallace, 889 F.2d 580 (5th Cir. 1989). Both of these cases are inapposite. In *Bell*, Douglas Bell's wife telephoned the police seeking protection after he threatened her. Although the couple quickly reconciled and asked the responding police officer to leave them alone, forty minutes later one of their neighbors called the police and reported that the wife was knocking on doors in search of safety. Returning to the scene, the same officer located Bell's wife down the street. Bell refused to allow the officer into his home, who initiated a background check,[6] and Bell's wife informed the police that her husband had attempted suicide.

Through a window, the police observed Bell holding several knives, one of which he drove into a wall near the front door and several of which he threw into the yard in the direction of the police. Bell specifically "told the [police] chief that he would kill any officer who entered and then kill himself," id. at 638, and "threatened to blow up his home using propane and kerosene in tanks immediately outside," id. at 639. The local police then sought assistance from the state police and even from Bell's father. None of these negotiations were prevailing. Following all of these activities, an

officer fired bean-bag rounds at Bell because he observed Bell lean toward one of the tanks with what appeared to be a cigarette lighter. As a result, Bell was injured and filed suit against certain individual officers asserting that they used excessive force.

Bell was not a case about unreasonable seizure; instead it was a case about the use of excessive force, where the plaintiff threatened that "he would kill any officer who entered and then kill himself." 321 F.3d at 638. Every alleged case of attempted suicide does not include threats to others. Indeed, there were no threats in the present case. The facts in Bell are completely at odds with the facts presently before this court. Certainly *Bell* does not support the proposition that Fisher's lawful possession of a firearm, standing alone, constitutes a sufficient basis upon which to justify the seizure in this case.

The other case upon which the dissent relies, *Wallace*, involved circumstances in which the police responded to a "disturbance." 889 F.2d at 582. Upon arriving at an apartment complex where the "disturbance" was reported, the officers heard loud voices emanating from the apartment. The officers knocked on the apartment door and "the door was opened by a woman who was red-faced and crying." *Id.* Wallace also came to the door. When the police asked whether "everything was okay," *id.*, Wallace "responded affirmatively," *id.*, but the woman "quickly said 'no' and informed the officers that Wallace had a gun and was threatening to kill himself," *id.* The officers then restrained Wallace's hands and removed his gun.[7] In upholding the district court's denial of Wallace's motion to suppress the gun, the Fifth Circuit determined that the removal of Wallace's

gun was "nothing more than a 'stop and frisk,'" *id.*, pursuant to *Terry v. Ohio* because "after learning from the *obviously distressed companion* that Wallace had a gun and was threatening suicide, 'it would have been poor police work indeed' for the police to have left the scene," Wallace, 889 F.2d at 582 (emphasis added) (citation omitted) (second bracket in original).

Wallace is also readily distinguishable from the present case. In *Wallace*, the officers were responding to a report of a disturbance, not a suicide report, and received confirmation through verbal and visual signs that Wallace could be a danger to himself and others. They acted only after Wallace and his wife could not agree on whether "everything was okay," and after she told them that Wallace had a gun and was threatening suicide. In the present case, the information presented to the officers was much more vague. The Alexanders were investigating an unconfirmed report that an individual was suicidal. Fisher was not in the company of an obviously distressed companion.

And, the deputies failed to question him. Rather, they drew their guns, ordered Fisher to the ground, and handcuffed him.[8]

Fisher has alleged facts sufficient to establish a violation of his constitutional rights. It is clearly established that an officer may not affect a mental health seizure without probable cause. Viewing the facts in the light most favorable to Fisher, we conclude that the Alexanders engaged in conduct that violated a clearly established constitutional right. Accordingly, we find that qualified immunity does not shield them from civil liability.

II.

Fisher also charges Tom Harden, in his official capacity as Sheriff of Morrow County, Ohio, with a failure to train and supervise his deputies. "Official-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent." Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658, 691, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978). To succeed on his *Monell* claim, Fisher must prove that the Morrow County Sheriff's Department was deliberately indifferent to the rights of citizens who came into contact with deputies. Stemler v. City of Florence, 126 F.3d 856, 865 (6th Cir. 1997). Fisher must show prior instances of unconstitutional conduct demonstrating that the County has ignored a history of abuse and was clearly on notice that the training in this particular area was deficient and likely to cause injury. *See id.*; Berry v. City of Detroit, 25 F.3d 1342, 1354 (6th Cir. 1994) (citing City of Canton v. Harris, 489 U.S. 378, 103 L. Ed. 2d 412, 109 S. Ct. 1197 (1989)). "Deliberate indifference is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." Stemler, 126 F.3d at 865 (citation omitted).

In this case, the evidence indicates that the officers received police training from the Ohio Peace Officers Training Academy. Mr. Alexander also trained for two months under the supervision of two sergeants. Despite his arguments to the contrary, Fisher has failed to produce sufficient evidence that the officers' training programs were inadequate. In addition, Fisher has not shown that the County knew of prior unconstitutional actions by its employees and failed to respond.

Accordingly, the district court did not err in granting summary judgment for Harden on the failure to train and supervise claim.

III

For the foregoing reasons, we find that the district court erred in granting summary judgment for the Alexanders on Fisher's constitutional claim, but not with respect to its summary judgments for Leary or Harden. The district court's order of summary judgment is REVERSED, in part, AFFIRMED, in part, and the case is REMANDED for proceedings consistent with this opinion.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

[1] Although Fisher's spouse, Doris Fisher, is also a named Plaintiff-Appellant in this cause of action, her state law claim for infliction of emotional distress was dismissed by the district court, which declined to exercise supplemental jurisdiction over all of the state law claims after it concluded that the Defendants were entitled to summary judgment. Inasmuch as the district court did not rule upon the state law claims as a matter of law, those claims are not the subject of this appeal.

[2] Although the dissent complains that it is "unclear whether . . . Fisher 'readily' complied with the requests once he heard them," dissent at 12, the record of this case fully supports this fact. The record indicates that Fisher did not take *any* action other than to lay down his rifle after he heard the deputy's command. During the following exchanges in his deposition, Mr.

Alexander responded to questions concerning Fisher's compliance:

Q. What was the first conversation that occurred after you got out of your cruiser?

A. I grabbed the mike to the PA and advised the subject to put down his gun. He did not seem as though you [sic] heard me the first time, so I told him the second time. Still no reply as though he heard me. So again I told him. And it was probably the third or fourth time that I told the subject to put down the gun that he did so.

. . .

Q. Okay. As he got closer to you, and you continued to give this command through the speaker, at some point it appeared that he did hear you; correct?

A. Correct. He laid the gun down. And then I advised him to put the chair and whatever else he had down. It took him two or three times to put the chair down. And then I continued to ask him to step to the road, turn around and walk backwards to us.

. . .

Q. He did obey you when it appeared that he finally heard what you were trying to tell him?

A. Correct.

Joint Appendix ("J.A.") at 272-75. On the basis of this evidence, we conclude that Mr. Alexander's testimony

clearly evinces Fisher's ready and willing compliance with the deputy's commands, once he heard those commands.

[3] The dissent attempts to distinguish *Monday* by arguing that "there is no indication that the deputies seized Fisher to detain him until he received a psychiatric evaluation," but rather that they "detained Fisher temporarily in order to determine whether probable cause existed to detain him further." Dissent at 13-14. This theory, however, assumes that the law governing investigative *Terry* stops in the criminal context applies equally to cases involving only a mental health seizure. That is not the law of this circuit.

In search of some support for its theory, the dissent attempts to expand this court's holding in *Monday*, and claims that in that case "this court analogized a dangerous mental condition 'to the role of criminal activity in traditional Fourth Amendment analysis.'" Dissent at 14. A full reading of the applicable passage in *Monday*, however, reveals that the analogy to criminal activity was used solely for the specific purpose of defining *what* constitutes probable cause:

The Fourth Amendment requires an official seizing and detaining a person for a psychiatric evaluation to have probable cause to believe that the person is dangerous to himself or others. If a dangerous mental condition is analogized to the role of criminal activity in traditional Fourth Amendment analysis, a showing of probable cause in the mental health seizure context requires only a 'probability or substantial chance' of dangerous behavior, not an actual showing of such behavior.

118 F.3d at 1102 (citations omitted). Thus, *Monday* never indicated that in the absence of criminal activity some lesser standard (i.e., reasonable suspicion) would apply to a less intrusive seizure.

[4] In this regard, we also note that the district court found the following:

Suicide is not a crime in Ohio. State v. Sage, 31 Ohio St.3d 173, 31 Ohio B. 375, 510 N.E.2d 343 (1987). However, the deputies were aware that under Ohio law, they had the authority to take a person into custody and transport the person to a hospital for a mental evaluation where they had "reason to believe that the person is a mentally ill person subject to hospitalization by court order . . . and represents a substantial risk of physical harm to self or others if allowed to remain at liberty pending examination."

J.A. at 26 (quoting Ohio Revised Code § 5122.10).

[5] We note the possibility that under certain emergency or exigent circumstances, where officers have reasonable suspicion (but not probable cause) to believe that it is imminent that an individual may commit suicide unless the officers intervene, a seizure may be constitutionally permissible. Those circumstances could present an exception to the general rule requiring probable cause to effect a mental health seizure. We do not believe that this case presents circumstances justifying the application of such an exception.

[6] Bell had a history of arrests for domestic violence, unlawful use of weapons, obstruction of justice, and drunk driving.

[7] The officers arrested Wallace for disorderly conduct, and Wallace was subsequently indicted for being a felon in possession of a firearm.

[8] The dissent also relies upon United States v. Butcher, 1993 U.S. App. LEXIS 19382, 1993 WL 272450, at *7 (6th Cir. July 19, 1993), for the proposition that the "fact that Fisher possessed one firearm gave the deputies reason to believe that he possessed another." Dissent at 16. Butcher, however, is also inapposite. That unpublished criminal case involved an appeal of a district court's order denying the defendants' motion to suppress evidence. The facts underlying the conviction involved a traffic stop, where the officers suspected the defendants of involvement in criminal activity, and in which a background check confirmed these suspicions, all prior to the contested seizures. One of the officers conducted a visual sweep of the front passenger compartment, during which he noticed the tip of a weapon under the seat.

When the *Butcher* court stated that the presence of a shotgun gave the officers a reasonable suspicion to believe that the defendants may possess other weapons on their persons, the issue before the court was whether a pat down or frisk of the defendants was justified. The officers, however, were presented with numerous indicia of criminal activity prior to the pat down. In the present case, the Alexanders never suspected Fisher of criminal activity. Even more, Fisher was not subjected to a pat and frisk prior to being forced to the pavement and handcuffed.

DISSENTBY: JULIA SMITH GIBBONS

DISSENT:

JULIA SMITH GIBBONS, Circuit Judge, dissenting. In my view, deputies Stephen and Molly Alexander did not violate Fisher's constitutional rights, and they were thus entitled to qualified immunity. I therefore dissent.

Initially, I note significant facts in the record that are not emphasized in the majority's opinion. First, while it eventually came to light that Fisher was perched on the railroad tracks in order to shoot groundhogs, the defendants testified that they were not familiar with Fisher prior to the incident and were not aware of his penchant for hunting groundhogs. Stephen Alexander was, however, aware that individuals sometimes committed suicide by sitting on the railroad tracks. This fact was known to Stephen both because his father had been a long-time railroad employee who told Stephen of people that had committed suicide by sitting on the tracks and because he was aware that, approximately one year prior, another individual committed suicide in Morrow County in such a manner. While the area in which Fisher was located was a rural area that hunters sometimes used, it is at a minimum questionable whether, as the majority asserts, Fisher "presented the appearance of an elderly man hunting." *See* slip op. at 6. At the time of the incident, the deputies thought Fisher was a suicidal threat to himself and others, not a hunter.[1]

Second, Fisher did not comply with the deputies' initial requests that he place the firearm and other items he was carrying on the ground. Although it is unclear at what point Fisher was able to hear the deputies' requests, it is also unclear whether, as the majority

asserts, Fisher "readily" complied with the requests once he heard them. *See id.* at 2. Stephen Alexander stated in his deposition that Fisher eventually obeyed the officers' requests, but he certainly did not portray Fisher's compliance as "ready and willing." For example, after it appeared that Fisher heard the officers, it still took two or three more requests for Fisher to comply with the request to put his chair down on the ground, according to both the incident report and Alexander's deposition testimony.

Third, as Fisher reached the road, at the point when Stephen told Fisher to walk backwards toward him and Molly, Stephen noticed several firearm ammunition shells in Fisher's overalls. Stephen could not tell at that time for what type of gun the shells were intended. Because he believed that the firearm Fisher placed on the ground was a shotgun and was unsure what type of shells Fisher had on his person, he feared that Fisher possessed another firearm. While it may not have been "out of the ordinary" for Fisher to have numerous ammunition shells on his person, it is certainly an important fact to note in assessing whether his constitutional rights were violated. *See id.* at 3. Also, in her supplemental statement in the police record and in her deposition, Molly Alexander noted that it appeared to her that Fisher had knelt down and picked something up after dropping his firearm, chair, and tripod.

The majority accurately lays out the test for whether qualified immunity applies to an official's actions. The first step in any qualified immunity inquiry is to determine whether the conduct of the officer in question violated the plaintiff's constitutional rights.

Saucier v. Katz, 533 U.S. 194, 200, 150 L. Ed. 2d 272, 121 S. Ct. 2151 (2001). If no constitutional violation occurred, then the officer is entitled to qualified immunity. *See* Vakilian v. Shaw, 335 F.3d 509, 516-18 (6th Cir. 2003); Mattox v. City of Forest Park, 183 F.3d 515, 520-24 (6th Cir. 1999). An examination of the facts of this case reveals that no constitutional violation occurred and that the majority thus errs in reaching the second step of the analysis - whether the right was clearly established. *See* Saucier, 533 U.S. at 201.

The Fourth Amendment grants citizens the right to be free from unreasonable searches and seizures by government officials. U.S. Const. amend. IV; Gardenhire v. Schubert, 205 F.3d 303, 312-13 (6th Cir. 2000). Fisher claims that the deputies violated this right when they detained him. The first issue to resolve is the precise point at which the deputies seized Fisher for Fourth Amendment purposes.

Not every encounter between a law enforcement officer and a citizen constitutes a seizure under the Fourth Amendment. For instance, a consensual encounter between an officer and a citizen during which the officer seeks voluntary cooperation from the citizen is not a seizure, and the officer need not possess any suspicion that the citizen is engaging in criminal activity to initiate such an encounter. United States v. Chapman, 305 F.3d 530, 533 (6th Cir. 2002). A seizure occurs for the purpose of the Fourth Amendment only when, "taking into account all of the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.'" Florida v. Bostick, 501 U.S. 429, 437, 115

L. Ed. 2d 389, 111 S. Ct. 2382 (1991) (quoting Michigan v. Chesternut, 486 U.S. 567, 569, 100 L. Ed. 2d 565, 108 S. Ct. 1975 (1988)). An example of a seizure is when an officer draws his weapon on a citizen. *See* United States v. Mendenhall, 446 U.S. 544, 554, 64 L. Ed. 2d 497, 100 S. Ct. 1870 (1980).

In this case, no seizure of Fisher occurred until the Alexanders drew their guns on him, which occurred when the deputies noticed he was carrying a gun across his shoulder. Until that point, the deputies did not signal to Fisher that his liberty was limited in any way. Fisher began approaching the deputies without being asked to do so and of his own accord. Only when the deputies drew their firearms did the encounter transform from a purely consensual one into a seizure for the purposes of the Fourth Amendment.

Of course, considering that a seizure did occur when the deputies displayed their weapons, the next question is whether the seizure and the deputies' related actions were appropriate. Under traditional Fourth Amendment jurisprudence, a police officer may temporarily detain an individual for investigation when he has a reasonable suspicion that the individual is or is about to be engaged in criminal activity. *See* Terry v. Ohio, 392 U.S. 1, 20-23, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968); United States v. Patterson, 340 F.3d 368, 370 (6th Cir. 2003). The majority interprets this test to mean that a police officer - in jurisdictions in which suicide is not a crime, as is the case here, State v. Sage, 31 Ohio St. 3d 173, 31 Ohio B. 375, 510 N.E.2d 343, 346 (Ohio 1987) - may not conduct an investigatory stop of an individual when he has a reasonable suspicion only that the individual is about to commit suicide (but not

engage in an actual criminal activity). Applying this interpretation of *Terry* to the present case, the majority holds that the deputies needed probable cause to detain Fisher. I disagree.

The majority relies on cases from this and other circuits indicating that, before detaining an individual suspected of having mental illness for an emergency medical evaluation or for involuntarily hospitalization, a police officer must have probable cause to believe that the individual is a threat to himself or others. *See, e.g.*, Monday v. Oullette, 118 F.3d 1099, 1102 (6th Cir. 1997)("The Fourth Amendment requires an official seizing and detaining a person for a psychiatric evaluation to have probable cause to believe that the person is dangerous to himself or others."). These cases are inapposite here. First, there is no indication that the deputies seized Fisher to detain him until he received a psychiatric evaluation. Rather, the record shows that the deputies momentarily detained Fisher to ensure that he was not a threat to them and then to question him. As Stephen Alexander explained, he was trying

to lie the suspect down, handcuff the suspect *for officer safety*, stand Mr. Fisher up, get him off the railroad track and over to the cruiser *where I could pat Mr. Fisher down for weapons and ascertain what was going on. If* Mr. Fisher was a suicide risk *and if* I felt he was in a mind set where he could be of risk to himself or others, I had the right under Ohio statute[2] to take Mr. Fisher into protective custody.

(Emphasis added.) In other words, the deputies detained Fisher temporarily in order to determine

whether probable cause existed to detain him further or hospitalize him pending a psychiatric evaluation. The majority concedes that "the seizure in this case was not specifically for purposes of a professional psychiatric evaluation," but states that this difference from *Monday* is of no effect. *See* slip op. at 7. I disagree. As Stephen Alexander explained, only *if* Mr. Fisher was a suicide risk, *and if* he could be a risk to himself or others, would the Ohio statute giving Alexander the right to hospitalize Fisher involuntarily apply such that probable cause would be necessary. As it happened, the whole episode lasted only five minutes, and by the time of Fisher's medical emergency, the deputies had not yet decided to detain him for a psychiatric evaluation. They were merely securing the scene and beginning to investigate whether such a detention would have been warranted, but the investigation was never completed because of Fisher's unfortunate medical incident. Probable cause was not required to conduct this temporary investigation and detention.

In *Monday*, this court analogized a dangerous mental condition "to the role of criminal activity in traditional Fourth Amendment analysis." 118 F.3d at 1102. The majority reads *Monday* as requiring that "officers detaining an individual believed to be suicidal must have 'probable cause to believe that the person is dangerous to himself or others.'" *See* slip op. at 5 (quoting Monday, 118 F.3d at 1102). This is not a precise reading of *Monday*, where the court set out probable cause as the standard for officials seizing and detaining a person for a psychiatric evaluation, but, contrary to the majority's intimations, did not hold that officers must have probable cause to detain *every* individual believed to be suicidal. 118 F.3d at 1102.

Crucially, the allegedly suicidal plaintiff in *Monday* did not have a weapon and posed a threat only to himself, not to others. Id. at 1101. In contrast, many of those individuals who are about to commit suicide certainly have a dangerous mental condition, one that poses a threat to both themselves *and* anyone else in their vicinity. *See, e.g.*, Bell v. Irwin, 321 F.3d 637, 639-40 (7th Cir. 2003) (noting that a person who had made suicidal threats while wielding knives was a danger to both himself and others present). The same logic that forms the basis for the *Monday* court's analogy of "dangerous mental conditions" to criminal activity also suggests that if a police officer has a reasonable suspicion that an individual is suicidal in a way that poses a risk to others, he may conduct a *Terry* stop of that individual even if suicide is not a crime in that jurisdiction. *See* Monday, 118 F.3d at 1102; United States v. Wallace, 889 F.2d 580, 582 (5th Cir. 1989) (holding that, in order to secure the safety of the individual and all others present, a police officer may conduct a stop and frisk of an individual when he has a reasonable suspicion that the individual is about to commit suicide and that the individual possesses a firearm). In fact, failing to ascertain whether an individual is suicidal would be "poor police work indeed," since an armed individual is potentially dangerous not only to himself but to others present. *Id.* (quoting Terry, 392 U.S. at 23). Therefore, the deputies in this case needed only a reasonable suspicion that Fisher was potentially about to engage in criminal activity.

Application of the correct standard of reasonable suspicion (not probable cause) to the present case yields the conclusion that the Alexanders did not violate Fisher's constitutional rights. Whether reasonable

suspicion to support a stop and frisk exists in any given case depends upon the totality of the circumstances known to the officers at the time of the seizure. *See* United States v. Ridge, 329 F.3d 535, 540 (6th Cir. 2003). Reasonable suspicion must be based on particularized and objective evidence, but the evidence need not be as reliable or extensive as that required to support probable cause. Weaver v. Shadoan, 340 F.3d 398, 407 (6th Cir. 2003); *see also* United States v. Sokolow, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 109 S. Ct. 1581 (1989) (noting that reasonable suspicion "is obviously less demanding than. . . probable cause").

In this case, the Alexanders - who conducted the seizure of Fisher - had a reasonable suspicion that Fisher was about to commit suicide. They received a dispatch indicating that a man was sitting on the railroad tracks with his feet tied to the tracks. The call also indicated that the man was suicidal. When they arrived on the scene, they saw Fisher sitting on the railroad tracks in a folding chair. Stephen knew that individuals committed suicide in this manner. Although Fisher arose from his chair and began approaching the deputies, they had no way of knowing from their distance if his feet had once been tied to the railroad tracks, as reported. Finally, they noticed that Fisher was carrying a firearm. As in *Bell* and *Wallace*, the fact that Fisher, an allegedly suicidal person with whom they were unfamiliar, was carrying a weapon could reasonably have led the deputies to believe that Fisher was a danger not only to himself but also to others, including the deputies themselves.[3] Therefore, it was permissible for them to detain him temporarily.

The next issue is whether the force used in conjunction

with the *Terry* stop was warranted. As the Supreme Court has noted, "Fourth Amendment jurisprudence has long recognized that the right to make an . . . investigatory stop necessarily carries with it with it the right to use some degree of physical coercion or threat thereof to effect it." Graham v. Connor, 490 U.S. 386, 396, 104 L. Ed. 2d 443, 109 S. Ct. 1865 (1989). Whether a particular use of force was within the bounds of the Fourth Amendment depends upon whether it was reasonably necessary under the circumstances. *See* id. at 395-97. "The question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." Id. at 397. The use of some degree of force will be justified if "the suspect poses an immediate threat to the safety of the officers or others." Id. at 396. When necessary to ensure the safety of the officers, such force may include both drawing a weapon and handcuffing the suspect. Houston v. Clark County Sheriff Deputy John Does 1-5, 174 F.3d 809, 814-15 (6th Cir. 1999); *see also* United States v. Heath, 259 F.3d 522, 530 (6th Cir. 2001) ("This Circuit permits the use of force, such as handcuffs and guns, to effect a stop when such a show of force is reasonable under the circumstances of the stop."). In certain circumstances, officers may be justified in fearing for their own safety when confronting a person they reasonably believe to be suicidal, and in these circumstances the use of the force necessary to neutralize this threat is warranted. *See* Wallace, 889 F.2d at 582 (holding that it was reasonable for police to restrain a suspect in the course of effectuating a *Terry* stop when they had reason to believe he was imminently suicidal and armed); *see also* Bell, 321 F.3d at 639-40 (finding that police officers were justified in

using "bean-bag rounds" to take down a man who threatened suicide, in part because of the threat he posed to the officers); *cf.* Monday, 118 F.3d at 1104-05 (finding that police were justified in using pepper spray to seize a suspect they had probable cause to believe was attempting suicide when the suspect was of considerable physical size and refused to hospitalize himself voluntarily).

As with the seizure inquiry, when assessing the reasonableness of the degree of force used by officers in effectuating a *Terry* stop, this court must consider the totality of the circumstances known to the officers prior to the use of force. *See* Graham, 490 U.S. at 397. Importantly, we do not evaluate the reasonableness of the force actually used "with the 20/20 vision of hindsight" by considering facts of which the officers were unaware but which later came to light. Id. at 396.

Here, the deputies were justified in drawing their weapons and in handcuffing Fisher. Upon arriving at the scene, it was reasonable for the deputies to conclude that a man they believed to be suicidal and who was in possession of a firearm posed an immediate threat to their safety. The deputies could reasonably deduce that such an individual would have little regard for the consequences of his actions and might turn the firearm he possessed on them. Hence, it was reasonably necessary for the deputies to draw their weapons on Fisher initially. Even after Fisher placed the firearm visible to the deputies on the ground, their further conduct was warranted. The fact that Fisher possessed one firearm gave the deputies reason to believe that he possessed another. *See* United States v. Butcher, 1993 U.S. App. LEXIS 19382, 1993 WL 272450, at *7 (6th

Cir. July 19, 1993). Moreover, prior to handcuffing Fisher, Stephen Alexander saw ammunition in Fisher's overalls that he believed could have been for another weapon on Fisher's person. That it later became apparent that Fisher did not possess a second firearm is of no moment. Again, as Stephen Alexander stated, the officers were trying to "pat Mr. Fisher down for weapons and ascertain what was going on." At the time the deputies handcuffed Fisher, it was reasonable under the circumstances then known to them to fear that he might suddenly reach for a second firearm and harm them. Consequently, it was also reasonably necessary for them to continue training their weapons on Fisher and to handcuff him in order to guarantee their own safety. The deputies even made sure that the manner in which Fisher was handcuffed did not cause him undue discomfort.

It should also be noted that the temporary detention did not otherwise ripen into an arrest, which would have necessitated probable cause. A *Terry* stop may ripen into an arrest due to the passage of time or due to the nature of the force used to effectuate the stop. Houston, 174 F.3d at 814. With respect to the duration of a *Terry* stop, the stop ripens into an arrest if police detain an individual longer than necessary to investigate the suspicious circumstances that led to the original stop. *See* United States v. Butler, 223 F.3d 368, 374 (6th Cir. 2000). The degree of force an officer uses to conduct an investigatory stop must be reasonably necessary to effectuate the stop; otherwise, the stop becomes an arrest. Feathers v. Aey, 319 F.3d 843, 851 (6th Cir. 2003).

In this case, the length of the detention does not

demonstrate that the *Terry* stop became an arrest. The detention lasted approximately five minutes, and the deputies were not able to complete their investigation because of Fisher's unfortunate medical emergency. As for the manner in which the deputies conducted the stop, they used no more force than was reasonably necessary. The deputies trained their guns on Fisher only until he was handcuffed, and the handcuffs were necessary to ensure that Fisher, who they reasonably feared was in possession of another firearm, did not harm them. As soon as Fisher became physically distressed and was no longer a potential threat to the deputies, his handcuffs were removed. In other words, in the circumstances of this case, the deputies did not exceed the scope of the initial stop. Rather, their actions were reasonably related to their investigation into whether Fisher was indeed suicidal and were reasonably necessary to ensure their own safety.

In conclusion, the facts of this case do not support the majority's conclusion that Fisher presented evidence sufficient to demonstrate that defendants violated his Fourth Amendment rights. The qualified immunity inquiry should thus end at the first step. While I agree with the majority that the district court did not err in granting summary judgment to Leary and Harden, for the foregoingreasons, I would also affirm the district court's judgment with respect to the Alexanders.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

[1] The majority states that the defendants conceded that "they were not responding to a report of criminal conduct and that they never suspected that Fisher was engaged in or about to be engaged in a crime." Slip op.

at 5. While it is true that the deputies were not responding to a report of criminal conduct, and there is no indication that the deputies thought Fisher was about to engage in some *specific* or premeditated criminal activity, the record makes clear that the deputies *did* in fact suspect (reasonably) that Fisher might pose a general threat to himself and other people.

[2] Ohio Rev. Code § 5122.10 grants police officers the right to hospitalize involuntarily individuals they have reason to believe are mentally ill.

[3] It should be noted that in none of the "mental health seizure" cases cited by the majority to support its conclusion that probable cause is the correct standard for evaluating the deputies' conduct did the allegedly suicidal or mentally ill individual carry a firearm. *See* Sullivan v. County of Hunt, 106 Fed. Appx. 215, 217-18 (5th Cir. 2004);Bailey v. Kennedy, 349 F.3d 731, 734-35 (4th Cir. 2003); Glass v. Mayas, 984 F.2d 55, 55-56 (2d Cir. 1993); Sherman v. Four County Counseling Ctr., 987 F.2d 397, 399 (7th Cir. 1993); Gooden v. Howard County, 954 F.2d 960, 962-64 (4th Cir. 1992); Harris v. Pirch, 677 F.2d 681, 682-85 (8th Cir. 1982); In re Barnard, 147 U.S. App. D.C. 302, 455 F.2d 1370, 1372 (D.C. Cir. 1971).

Case Number C-2-00-1377
Judge James L. Graham

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

William E. "Buster" Fisher, et al.,
Plaintiff

v.

Sheriff Tom E. Harden, et al.,

Defendant
Filed, August 6, 2002

JUDGMENT IN A CIVIL CASE

[ ] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[ ] Decision by Court. This action came to trial before the Court. The issues have been tried or heard and a decision has been rendered.

[X] Decision by Court without trial or hearing.

IT IS ORDERED AND ADJUDGED that defendant's motion or summary judgment on the 1983 claims of Mr. Fisher is GRANTED. Plaintiff's cross motion for summary judgment on those claims is DENIED. Final judgment is hereby entered in favor of the defendants on the 1983 claims and plaintiff's state law claims are

dismissed without prejudice.

August 6, 2002
Date

KENNETH J. MURPHY
Clerk

/s/
Deputy Clerk

Case Number C-2-00-1377
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

William E. "Buster" Fisher, et al.,
Plaintiffs,

v.

Sheriff Tom E. Harden, et al.,
Defendants.

Filed, August 6, 2002

OPINION AND ORDER

This is a civil rights action filed pursuant to 42 U.S.C. §1983 by plaintiff William E. "Buster" Fisher against Morrow County, Ohio, Sheriff Tom E. Harden, who is being sued in his official capacity. Also named as defendants in their official and individual capacities are Deputy Sheriff Mark Leary and two former deputies, Stephen and Molly Alexander. Mr. Fisher alleges that the deputies arrested him without probable cause and used excessive force during the course of the arrest in violation of his rights under the Fourth Amendment of the United States Constitution. Mr. Fisher also asserts state law claims of false arrest, false imprisonment, and assault and battery against these defendants. Mr. Fisher's wife, Doris Fisher, has asserted a state law claim of intentional infliction of emotional distress against these defendants. Finally, Mr. Fisher has asserted a claim against Sheriff Harden based upon the alleged failure to adequately supervise, train and

discipline the deputy defendants.n1

This matter is before the court on the defendants' motion for summary judgment and the plaintiffs' cross-motion for summary judgment on the §1983 claims of Mr. Fisher.

The procedure for granting summary judgment is found in Fed. R. Civ. P. 56(c), which provides:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

The evidence must be viewed in the light most favorable to the nonmoving party. Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970). Summary judgment will not lie if the dispute about a material fact is genuine, "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). However, summary judgment is appropriate if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). See also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986).

The Sixth Circuit Court of Appeals has recognized that Liberty Lobby, Celotex and Matsushita effected "a

decided change in summary judgment practice," ushering in a "new era" in summary judgments. Street v. J. C. Bradford & Co., 886 F.2d 1472, 1476 (6th Cir. 1989). The court in Street identified a number of important principles applicable in new era summary judgment practice. For example, complex cases and cases involving state of mind issues are not necessarily inappropriate for summary judgment. Id. at 1479. In addition, in responding to a summary judgment motion, the nonmoving party "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'" Id. (quoting Liberty Lobby, 477 U.S. at 257). The nonmoving party must adduce more than a scintilla of evidence to overcome the summary judgment motion. Id. It is not sufficient for the nonmoving party to merely "'show that there is some metaphysical doubt as to, the material facts.'" Id. (quoting Matsushita, 475 U.S. at 586). Moreover, "[t]he trial court no longer has a duty to search the entire record to establish that it is bereft of a genuine issue of material fact." Id. That is, the nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact.

I. Summary of Facts

The facts of this case are largely undisputed. Mr. Fisher is a resident of Mt. Gilead, Morrow County, Ohio. At the time in question, he was seventy- seven years old. Mr. Fisher occasionally spent time shooting the groundhogs which plagued his neighbors' lawns and gardens. On July 10, 2000, Mr. Fisher was seated in a

folding lawn chair on the railroad tracks near the residence of Ruth and Robert Creswell. He was observed by John Palser and Robert Staats, who were driving nearby on County Road 59. Mr. Staats thought that Mr. Fisher's feet appeared to be tied to the rails, and the two men became concerned that Mr. Fisher might be attempting suicide. They had never seen Mr. Fisher or anyone else sitting on the tracks before. n2 When they arrived at Mr. Palser's home, Mr. Staats called 9-1-1 and reported that there was a man sitting on the tracks who might be trying to commit suicide. The log of the Morrow County Sheriff's Office reflects that the call, received at 5:00 p.m., was made from the Gillespie residence and reported that a man was sitting on the tracks on County Road 59 and that his feet were tied to the tracks.

Deputy Stephen Alexander and Auxiliary Deputy Molly Alexander (they are husband and wife) were dispatched to the scene, with the call being coded as a fifty-eight, or possible suicide attempt. Mr. Alexander's father had worked for the railroad, so he was familiar with the practice of individuals committing suicide by sitting on railroad tracks, and there had been an incident the previous year in Morrow County of a person committing suicide in that fashion. A medical squad was also dispatched to the scene at that time, and the railroad was notified to hold up any trains which might be in the vicinity.

The two deputies proceeded to the intersection of County Route 59 and the railroad tracks. They observed Mr. Fisher sitting in a chair on the tracks approximately two hundred to two hundred and fifty yards away. He did not have his feet tied to the tracks

at that time. However, they observed that Mr. Fisher had a long rifle, and reported this fact by radio at 5:09 p.m. According to Mr. Alexander, Mr. Fisher did not appear to be hunting.

Mr. Alexander called to Mr. Fisher. He put the gun over his shoulder, folded up his chair, and picked up a wooden object consisting of two narrow pieces of wood about three feet long and fastened together in an "X" shape at the top (later shown to be a stand for the rifle). He then began walking towards the deputies. Mr. Fisher did not point the rifle at the deputies, but he carried it on a strap over his shoulder while keeping one hand on it. The deputies, having observed the rifle, got behind the door of the cruiser and drew, their guns as a precaution. Stephen Alexander used the broadcast system in the cruiser to tell Mr. Fisher to put the gun down. Deputy Alexander had to tell Mr. Fisher three to four times to put the gun down before he finally complied. Mr. Alexander also told Mr. Fisher to put the chair and the wooden stand down two or three times before Mr. Fisher complied with this request.

Mr. Fisher advanced steadily towards them, and did not make any threatening gestures or evasive movements. n3 As Mr. Fisher drew near to the intersection, Stephen Alexander observed several bullets stuck in a pocket across the chest of Mr. Fisher's denim overalls. Mr. Alexander did not observe any weapon besides the rifle, but he did not recognize the bullets as being rifle bullets at that time, and was concerned that Mr. Fisher might have another gun in his possession. As Mr. Fisher came closer, Mr. Alexander asked him to walk backwards towards him. Mr. Fisher refused to comply with this request and

continued to walk directly towards him. Mr. Fisher finally turned around after the third or fourth command. Mr. Alexander ordered Mr. Fisher to lie face down on the ground and Mr. Fisher complied. Mr. Alexander used handcuffs to secure Mr. Fisher's arms behind his back. Mr. Alexander observed that Mr. Fisher had broad shoulders, and when Mr. Fisher stated that he had arthritis in his shoulders and could not easily put both hands behind him, Mr. Alexander "double-cuffed" Mr. Fisher by using two pairs of handcuffs instead of one so that Mr. Fisher would not be uncomfortable. No physical force of any kind was used in placing Mr. Fisher on the ground or in handcuffing Mr. Fisher. Prior to handcuffing Mr. Fisher, Mr. Alexander holstered his firearm, and after Mr. Fisher was handcuffed, Mrs. Alexander also holstered her weapon: Mrs. Alexander's involvement in this encounter was apparently confined to keeping Mr. Alexander covered with her weapon.

Ruth Creswell and other neighbors approached the scene during this time. Mrs. Creswell yelled at the deputies that Mr. Fisher was just hunting groundhogs, and that he had a heart condition and wasn't a threat to them. However, Mr. Alexander could not understand what she was saying and was concerned about being distracted from his task of securing Mr. Fisher during what he perceived to be a potentially unpredictable and threatening situation. It was Mr. Alexander's intent at this point not to arrest Mr. Fisher, but to question him to ascertain whether he was suicidal.

Mr. Alexander attempted to assist Mr. Fisher to his feet to take him to the cruiser, but Mr. Fisher went limp, from which Mr. Alexander inferred that Mr.

Fisher was not cooperating, Mr. Fisher did not demonstrate any signs of being in physical distress at that time. Mr. Alexander gently laid Mr. Fisher back on the ground and went down the tracks to retrieve the rifle.

Sergeant Mark Leary, the supervising officer, arrived at the scene, and observed Mr. Alexander cuffing Mr. Fisher. Mrs. Creswell was screaming, and he couldn't understand what she was saying until he went up to her. Mrs. Creswell stated that Mr. Fisher had a heart condition. Sergeant Leary observed at that point that Mr. Fisher was in distress and called at 5:14 p.m. for the squad to come in immediately. He removed the handcuffs and rolled Mr. Fisher over on his back and lifted his head, at which point the squad personnel took over. It was learned that Mr. Fisher had suffered a heart attack and had stopped breathing. He was resuscitated by the' squad and transported to the hospital. Mrs. Fisher arrived at the scene at some point during this incident, and went with her husband in the squad.

The evidence reveals that the deputies did not know Mr. Fisher prior to this incident, and were unfamiliar with his physical and mental condition or the fact that he had hearing problems or a heart condition. Apparently the only statement made by Mr. Fisher during this incident was to tell the deputies that he had arthritis and could not put both hands behind his back. Mr. Fisher is unable to recall anything about this incident.

Sheriff Harden conducted an investigation of the events in question. His report of that investigation is included

in the record as Exhibit B to defendants' motion for summary judgment.

II. Qualified Immunity Defense

To successfully establish a prima facie case under §1983, a plaintiff must prove the following two elements: (1) the defendant must be acting under color of state law, and (2) the offending conduct must deprive the plaintiff of rights secured by federal law. Parratt v. Taylor, 451 U.S. 527, 535 (1981); Bloch v. Ribar, 156 F.3d 673, 677 (6th Cir. 1998).

The defendants in this case deny that their, conduct violated Mr. Fisher's Fourth Amendment rights. The defendants also argue that, even assuming that their conduct violated Mr. Fisher's constitutional rights, they are entitled to qualified immunity on the claims against them in their individual capacities.

Under the doctrine of qualified immunity, "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald 457 U.S. 800, 818 (1982). Whether qualified immunity is applicable to an official's actions is a question of law. Dickerson v. McClellan, 101 F.3d 1151, 1157 (6th Cir. 1996).

The initial inquiry in ruling on a qualified immunity issue is whether the facts alleged show that the officer's conduct violated a constitutional right, viewing those allegations in the light most favorable to the party

asserting the injury. Siegert v. Gilley, 500 U.S. 226, 232 (1991). If no violation of a constitutional right has been alleged, there is no need for further inquiries concerning qualified immunity. Saucier v. Katz, 533 U.S. 194, 201 (2001).

If, on the other hand, a violation of a constitutional right has been alleged, the court must go on to determine whether the constitutional right in question was clearly established at the time of the alleged event, such that a reasonable official would understand that what he is doing violates that right. Katz 533, U.S. at 201. Whether an official may prevail in his qualified immunity defense depends upon the objective reasonableness of his conduct as measured by reference to clearly established law. Davis v. Scherer, 468 U.S. 183, 191 (1984).

For a constitutional right to be clearly established, its contours "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640 (1987); Ewolski v. City of Brunswick, 287 F.3d 492, 501 (6th Cir. 2002). It is not necessary that "the very action in question has previously been held unlawful," but "in the light of pre-existing law the unlawfulness must be apparent." Anderson, 483 U.S. at 640. The relevant question is whether the state of the law at the time of the incident gave defendants fair warning that their alleged acts were unconstitutional. Hope v. Pelzer, 122 S.Ct. 2508, 2516 (2002). In determining whether a constitutional right was clearly established, this court must look first to the decisions of the Supreme Court, then to decisions of the Sixth Circuit and other courts within this circuit, and finally to the decisions of other

circuits. Daugherty v. Campbell , 935 F.2d 780, 783 (6th Cir. 1991).

If the law at he time of the event did not put the off icer on notice that his conduct would be clearly unlawful, then summary judgment based on qualified immunity is appropriate. Katz, 533 U.S. at 202. Mr. Fisher bears the burden of showing that the law was clearly established at the time of the offensive conduct. Hughes v. City of North Olmsted, 93 F.3d 238, 241 (6th Cir. 1996).

In the context of an unlawful arrest claim, qualified immunity shields the arresting officers if a reasonable officer could have believed the arrest to be lawful in light of clearly established law and the information possessed by the arresting officers. Anderson, 483 U.S. at 641. The inquiry is an objective one, based on what conduct a reasonable police officer would believe to be lawful based on the information then possessed by the officers, not on what the officers subjectively may have believed. Anderson, 483 U.S. at 641. Even if the officers are reasonably mistaken in their belief that probable cause is present, they are entitled to immunity. Hunter v. Bryant, 502 U.S. 224, 226 (1991).

Qualified immunity may also protect officers against a claim of excessive use of force during the course of a stop or arrest. Katz 533 U.S. at 206. "Officers can have reasonable, but mistaken, beliefs as to the facts establishing the existence of probable cause or exigent circumstances," and in excessive force cases, "qualified immunity can apply in the event the mistake belief was reasonable." Id. Excessive force claims are also "evaluated for objective reasonableness based upon the

information the officers had when the conduct occurred." Katz, 533 U.S. at 207. The question in such a case "is what the officer reasonably understood his powers and responsibilities to be, when he acted, under clearly established standards." Id. at 208.

A. Existence of a Constitutional Violation

1. Grounds for Stop

Mr. Fisher first argues that the deputies in this case did not have grounds to stop him under Terry v. Ohio, 392 U.S. 1 (1968). In that case, the Supreme Court held that where a law enforcement officer possesses a reasonable and articulable suspicion that a person has been involved in criminal activity, he may detain the suspect briefly to investigate the suspicious circumstances, and may frisk the suspect for weapons if he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. Id., 392 U.S. at 21-22, 27. "Reasonable suspicion" is a standard less than probable cause which requires only specific objective facts upon which a prudent-official, in light of his experience, would conclude that illicit activity might be in progress. McPherson v. Kelsey, 125 F.3d 989, 993 (6th Cir. 1997). The key is the reasonableness of the officer's actions, and the stop maybe valid even if the officer's informat ion turned out to be erroneous Id, at 994.

Mr. Fisher argues that the phoned 9-1-1 report of his activities constituted an anonymous tip which was insufficient to support a Terry stop, citing Florida v. J.L., 529 U.S. 266 (2000). In that case, the police

received an anonymous tip that a young black male who was standing at a bus stop and wearing a plaid shirt was carrying a gun. Nothing was known about the informant. The officers proceeded to the bus stop and observed a young black male wearing a plaid shirt, but the officers saw no firearm, the suspect made no threatening or unusual movements, and the officers had no reason to suspect that he was engaging in any illegal conduct. Id., 529 U.S. at 268. The Supreme Court concluded that the anonymous tip lacked the required indicia of reliability and furnished no means for the police to test the informant' s knowledge or credibility in regard to the alleged illegal activity. Id, at 270-271.

The instant case is readily distinguishable. There is no evidence that the tip here was anonymous. Rather, the radio log reflects that the origin of the tip was the Gillespie residence. Robert Staats, the individual who spoke with the 9-1-1 operator, went back to the scene of the incident to learn how the matter was resolved, and was later interviewed by Sheriff Harden. Further, the reliability of the report of a possible suicide to the 9-1-1 operator was corroborated by the observations of the deputies at the scene. Not only did they observe Mr. Fisher sitting on the railroad tracks where he was reported to be, but they also saw that he had a rifle, circumstances which were compatible with a possible attempted suicide and which warranted additional investigation.

Mr. Fisher also contends that the deputies were not authorized to approach him under Terry because they had no reason to suspect that he was engaged in criminal activity. Although later investigation revealed that Mr. Fisher had violated various Ohio laws by

trespassing on the railroad's right of way and hunting without the railroad's permission, it is true that when the deputies made contact with Mr. Fisher, they did so solely to investigate a possible suicide. Suicide is not a crime in Ohio. State v. Sage, 31 Ohio St. 3d 173, 510 N. E. 2d 343 1987). However, the deputies were aware that under Ohio law, they had the authority to take a person into custody and transport the person to a hospital for a mental evaluation where they had "reason to believe that the person is a mentally ill person subject to hospitalization by court order ... and represents a substantial risk of physical harm to self or others if allowed to remain at liberty pending examination." Ohio Revised Code §5122.10.

Cases indicate that police-citizen contacts under Terry are not limited to situations where the officer suspects that an individual is engaged in criminal activity. "Encounters are initiated by the police for a wide variety of purposes, some of which are wholly unrelated to the desire to prosecute for crime." Terry , 392 U.S. at 13. As the Tenth Circuit noted in United States v. King, 990 F.2d 1552, 1560 (10th Cir. 1993):

Indeed, police officers are not only permitted, but expected, to exercise what the Supreme Court has termed "community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." Cady v. Dombrowski, 413 U.S. 433, 441, 93 S.Ct. 2523, 2527, 37 L.Ed.2d 706 (1973). In the course of exercising this noninvestigatory function, a police officer may have occasion to seize a person, as the Supreme Court has defined the term for Fourth Amendment purposes, in order to ensure the safety of

the public and/or the individual, regardless of any suspected criminal activity. [Citations omitted.] The fact that the officer may not suspect the individual of criminal activity does not render such a seizure unreasonable per se as Terry only requires "specific and articulable facts which ... reasonably warrant [an] intrusion" into the individual's liberty." Terry, 392 U.S. at 21, 88 S.Ct. at 1880.

The court went on to state that whether the seizure of a person in a noninvestigatory situation is reasonable depends on whether it is based on specific and articulable facts, and that this analysis requires a balancing of the governmental interest in the police officer's exercise of his "community caretaking function" and the individual's interest in being free from arbitrary government interference. Id.

In Kelsey, 125 F. 3d at 994,the Sixth Circuit held that a court security officer acted reasonably in stopping the plaintiff, a disgruntled litigant in a child custody dispute, and frisking him for weapons based upon information provided by a judge that the plaintiff might be carrying a weapon. There is no suggestion in the court's description of the facts that the officers had any reason to suspect that the individual was otherwise engaged in criminal activity. In United States v. Wallace, 889 F.2d 580 (5th Cir: 1989)., the police received information that the defendant had a gun and was threatening to kill himself. The court upheld the actions of the police in restraining the defendant, seizing his gun, and taking him into custody for disorderly conduct. The court commented that it would have been poor police work for the police to have simply left the scene, and held that the police had

reasonable grounds to believe that [defendant] was armed and potentially dangerous to all present and they were entitled, if not obliged, to search his outer clothing for weapons." Id. at 582.

Authorities indicate that the same Fourth Amendment standards applicable to investigative stops and arrests for criminal activity apply as well to police investigations of persons who are reportedly mentally ill. In such cases, the state has a legitimate interest in protecting the community from the mentally ill and in protecting a mentally ill person from self-harm, and a person suspected of mental illness possesses a right to liberty and a right to freedom from unfounded charges of mental infirmity. Pino v. Higgs, 75 F.3d 1461, 1468 (10th Cir. 1996). Balancing these interests, courts have held that under the Fourth Amendment, an official must have probable cause to believe that a person is dangerous to himself or others before that person can be taken into custody and transported to a hospital for a psychiatric evaluation. Monday v. Oullette, 118 F.3d 1099, 1102 (6th Cir. 1997) ; S.P. v. City of Takoma Park, Md., 134 F.3d 260, 266 (4th Cir. 1998); Ahern v. O'Donnell, 109 F.3d 809, 815 (1st Cir. 1997); Pino, 75 F.3d at 1468. However, even where probable cause is lacking, a police officer, pursuant to the guidelines applicable to a Terry stop, may investigate a report of a possibly suicidal individual where articulable facts indicate that the individual may present a danger to himself or to others.

Here, the officers were acting on a report that a man was sitting on the railroad tracks, and that his feet appeared to be tied to the tracks. Three citizens observed Mr. Fisher at this location and found his

actions to be highly unusual. Mr. Staats was concerned enough to report his observations to the police. When the deputies arrived at the scene, they also observed that Mr. Fisher had a rifle. They were justified in investigating the situation to ascertain whether Mr. Fisher presented a risk of harm to himself or others, and the stop was not prohibited under the Fourth Amendment.

2. Stop or Arrest

Mr. Fisher argues that even if the deputies in this case properly approached him to ascertain whether he was suicidal, the measures they employed in effecting the stop, including drawing their weapons, asking him to lie on the ground, and handcuffing him, converted the stop into a full-blown arrest, for which they lacked probable cause.

A Terry stop can ripen into an arrest through the passage of time or the use of force, and when this happens, the detention of the suspect must be based on probable cause. Houston v. Clark County Sheriff Deputy John Does 1-5, 174 F.3d 809, 814 (6th Cir. 1999). However, the mere use of force in making a stop will not necessarily convert a stop into an arrest. United States v. Hardnett, 804 -F. 2d 353, 357 (6th Cir. 1986). The standard is whether the length and manner of the stop was reasonably related to the basis for the initial intrusion. Id.; see also United States v. Heath, 259 F.3d 522, 529-30 (6th Cir. 2001) (detention and investigative methods used must be reasonable under the circumstances, and degree of force utilized must be reasonably related in scope to the situation at hand and not so intrusive as to constitute an arrest).

When police officers reasonably fear that suspects are armed and dangerous, they may order the suspects out of a car and may draw their weapons when those steps are reasonably necessary for the protection of the officers. Heath, 259 F.3d at 530 (effectuating stop with guns drawn did not convert stop to arrest) ; Houston, 174 F.3d at 814-15 (detention in cruiser did not exceed bounds of Terr stop); Hardnett, 804 F.2d at 357 (approaching with guns drawn and ordering suspects out of car reasonably necessary under circumstances). The use of handcuffs to secure suspects does not exceed the bounds of a Terry. stop so long as the circumstances warrant that precaution. Heath, 259 F.3d at 530; Houston, 174 F.3d at 815. Courts have also held that officers may order the suspect to kneel or lie on the ground without converting a stop to an arrest if the circumstances warrant this action. See.United States v. Shareef, 100 F.3d 1491 (10th Cir. 1996) (suspects ordered to kneel on pavement); United States v. Perdue, 8 F.3d 1455, 1463 (10th Cir. 1993) (police justified in ordering suspect out of his car and onto the ground as a means of neutralizing the potential danger; directing suspect to lie on the ground provided officers with a better view of suspect and prevented him from obtaining weapons).

In determining whether the measures taken by the deputies in this case were excessive under the circumstances so as to convert the stop into an arrest, this court must "view those facts 'from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.'" Neague v. Cynkar, 258 F.3d 504, 507 (6th Cir. 2001) (quoting Kostrzewa v. City of Troy, 247 F.3d 633, 639 (6th Cir. 2001)). "In

determining whether police conduct during an investigatory stop is reasonable, a court 'should take care to consider whether police are acting in a swiftly developing situation, and in such cases the court should not indulge in unrealistic second-guessing.'" Shareef, 100 F.3d at 1505 (quoting United States v. Sharpe, 470 U.S. 675, 686 (1985)).

The evidence in the instant case indicates that the measures employed by the deputies in this case did not convert the Terry stop into an arrest. The duration of the stop was not unreasonable. The sheriff's department radio log indicates that the entire encounter, from the time that the deputies reported that Mr. Fisher had a gun to Sergeant Leary's request for the squad personnel to come to the scene, lasted at most five minutes. The deputies were responding to a report of a person who was acting in the unusual manner of sitting on a railroad track with his feet possibly tied to the tracks, which indicated that he was possibly suicidal. When they arrived, they observed that Mr. Fisher had a long rifle. He repeatedly failed to follow Mr. Alexander's requests to put the rifle down. When Mr. Fisher approached the intersection of the road and the railroad tracks, Mr. Alexander observed bullets sticking up from a pocket across Mr. Fisher's overalls, and he was concerned that Mr. Fisher might have another gun. See United States v. Butcher, 1993 WL 272450 (unreported) (6th Cir. 1993) (where officers saw suspect with a weapon, they had reasonable suspicion to believe that suspect might have other weapons) ; United States v. Taylor, 1991 WL 100583 (unreported) (6th Cir. 1991) (where officers saw gun in plain view in car, officers had right under Terry to detain suspects and search them for additional

weapons). Asking Mr. Fisher to lie on the ground and then handcuffing him was a reasonable way of securing him to pat him down for additional weapons. Mr. Alexander did not shove or physically force Mr. Fisher to the ground, nor did he use any force in handcuffing Mr. Fisher. He used two pairs of handcuffs so that Mr. Fisher would not be uncomfortable.

Mr. Fisher argues that such measures were unnecessary, since he was an elderly gentleman with a heart condition who made no threatening movements and posed no threat to the deputies. However, the photographs of Mr. Fisher in the report of plaintiff's expert, Donald J. Van Meter, Exhibit 9 to plaintiffs' memorandum contra, reveal that Mr. Fisher has broad shoulders and a stocky build. Mr. Fisher claims he was hunting groundhogs, and thus implicitly admits that he was capable of shooting his rifle. He walked steadily towards the officers and did not demonstrate any signs of physical distress until after he was handcuffed.

The evidence reveals that the deputies did not know Mr. Fisher prior to this encounter and were unaware of his hearing problems or heart condition. They were not aware that Mr. Fisher frequently hunted groundhogs in the area, or that he had a kind and peaceful disposition. It was not obvious to the deputies that Mr. Fisher was hunting on the day in question. They only knew that they were dealing with an elderly gentleman who was sitting precariously on railroad tracks holding a rifle, and that he reportedly had been observed with his feet tied to the tracks. The only statement made by Mr. Fisher to the deputies concerned his arthritis. There is no evidence that he immediately told the deputies that he was only shooting groundhogs, or that he offered

any other explanation for his conduct. This silence on Mr. Fisher's part would have extended the uncertainty and unpredictability of the situation.

In some cases, the use of handcuffs or drawn weapons has been held to constitute excessive force sufficient to convert a stop to an arrest. However, those cases involved different facts. In Ingram v. City of Columbus, 185 F.3d 579 (6th Cir. 1999), the court held that the officers' actions exceeded the scope of a Terry stop where the officers handcuffed the suspects even though they saw no weapons in the possession of the suspects and had no reason to fear for their personal safety. Here, the officers saw Mr. Fisher in possession of a high-powered rifle and ammunition. In Robinson v. Solano County, 218 F.3d 1030 (9th Cir. 2000), the deputy walked up to an unarmed man and put a pistol to the man's head. There is no evidence in this case that the deputies held their firearms anywhere near Mr. Fisher's person, and they promptly holstered their weapons after Mr. Fisher was handcuffed. There is no evidence that Mr. Fisher sustained any bruises or other injuries as a result of being handcuffed or asked to lie on the ground. The court concludes that the circumstances of this case are insufficient to convert the investigatory stop into an arrest without probable cause.

3. Excessive Force

Mr. Fisher contends that the deputies used excessive force during the encounter. Under Graham v. Connor, 490 U.S. 386, 395 (1989), a claim of excessive force during the course of an arrest, investigatory stop, or other seizure of a free citizen must be analyzed under

the Fourth Amendment and its "reasonableness standard. This "reasonableness" inquiry is based on the totality of the circumstances of the particular case, and the reasonableness of the officers' actions must be judged from the perspective of the reasonable officer at the scene, rather than the "20/20 vision of hindsight." Id., 490 U.S. at 396; Dudley v. Eden, 260 F. 3 d 722, 725-26 (6th Cir. 2001) "If an officer, reasonably, but mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed." Katz, 533 U.S, at 205.

The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split second judgments--in circumstances that are tense, uncertain, and rapidly evolving-- about the amount of force that is necessary in a particular situation." Graham, 490 U.S. at 396-97. As the Sixth Circuit stated in Smith v. Freland, 954 F.2d 343, 347 (6th Cir. 1992):

Thus, under Graham, we must avoid substituting our personal notions of proper police procedure for the instantaneous decision of the officer at the scene. We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. What constitutes "reasonable" action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure.

Much of the discussion of the facts in the previous section applies equally to the issue of whether excessive force was used in this case. The deputies in

this case drew their guns, but did so when they observed that Mr. Fisher had a rifle. This was a reasonable response. There is no evidence that the deputies made any unnecessary threats with their weapons, such as holding a gun to Mr. Fisher's head or close to his person, and they promptly holstered their weapons when Mr. Fisher had been secured.

The Sixth Circuit addressed claims similar to those in this case in Randles v. Gregart, 965 F.2d 90 (6th Cir. 1992). In that case, two deputy sheriffs observed the plaintiff, an elderly farmer, carrying a rifle while walking towards his farmhouse during November. The deputies met plaintiff at the house, where the deputies requested that he relinquish his rifle. Plaintiff refused, at which point one of the deputies forcibly wrested the rifle from plaintiff's possession, twisting his arm in the process Plaintiff stated that he was hunting a "varmint" that had been killing his geese. The deputies then issued a citation for hunting without a senior citizen's license. The forceful seizure of the rifle aggravated a pre-existing bursitis condition which eventually subsided and disappeared with the advent of warm weather. The court held that plaintiff's Fourth Amendment claim alleging the use of excessive force was without foundation. Id. at 92.

Here, the deputies did not forcibly take the rifle from Mr. Fisher. He was asked to lie on the ground; the deputies did not physically shove or force him to the ground in any way. Mr. Fisher was handcuffed, but there is no evidence that any physical injuries were caused by this process. A claim of excessive use of force can arise from the use of handcuffs. For example, in Alexander v. County of Los Angeles, 64 F.3d 1315, 1323

(9th Cir. 1995), the court found that qualified immunity was not available where the suspect informed officers that he was a dialysis patient, but his repeated requests to remove or loosen handcuffs were denied for up to forty minutes, his hands became' swollen and turned blue, and nine months after the incident, his right hand was still swollen, numb, and had a walnut-sized protrusion on the back. In Palmer v. Sanderson, 9 F.3d 1433, 1436 (9th Cir. 1993), the court denied qualified immunity to an officer who tightly handcuffed an elderly man and refused to loosen the handcuffs.

In contrast, there is no evidence that the handcuffs themselves caused Mr. Fisher any injury or discomfort to his arms or shoulders. The handcuffs were only on a minute or two, and Mr. Alexander used two pairs of cuffs. The use of handcuffs during the course of an otherwise lawful arrest or stop which causes no physical injury fails to state a claim for ex cessive force as a matter of law. Neague, 258 F.3d at 508.

It is undisputed that the encounter between the deputies and Mr. Fisher in this case produced tragic results. The deputies, unbeknownst to them, were dealing with a particularly vulnerable individual with a heart condition. There is certainly no evidence that the deputies were deliberately trying to alarm or frighten Mr. Fisher unnecessarily or that they were trying to provoke a heart attack.

Under these circumstances, "the reasonableness of their response must be gauged against the reasonableness of their perceptions, not against what may later be found to have actually taken place." Gooden v. Howard County, Md., 954 F.2d 960, 965 (4th

Cir. 1992). "An officer cannot be expected to accurately anticipate all of the possible responses a subject may have to his commands and then tailor his actions accordingly in order for his conduct to fall into the category of what is considered reasonable." Reynolds v. County of San Diego, 84 F. 3d 1162, 1169 (9th Cir. 1996). The deputies were not required to assume that Mr. Fisher was not suicidal and posed no threat to them merely because he was elderly. Older individuals such as Mr. Fisher are capable of firing weapons, and they are known to suffer from mental disorders and to, commit suicide. Mr. Fisher was armed with a long rifle and ammunition, and consistently failed to comply with the instructions of the officers. The officers acted reasonably in considering this to be a possible threat to their own safety and the safety of other persons who were gathered at the scene.

The fact that Mr. Fisher was not actually suicidal is not sufficient to render the officers' conduct unreasonable. See Dudley v. Eden 260 F.3d 722, 727 (6th Cir. 2001) (officer's use of force in shooting suspect reasonable, where officer had no way of knowing that suspect was not armed and had no intention of killing officer); Oullette, 118 F.3d at 1102 (mental health seizure can rest upon probable cause even when the person seized does not actually suffer from a dangerous mental condition). If Mr. Fisher had in fact been mentally imbalanced and in the process of attempting suicide by train or by shooting himself, the results of the confrontation may have been even more tragic if the deputies had failed to promptly disarm Mr. Fisher, thereby allowing him to fire on himself, the deputies or other bystanders. See Gooden, at 967 (consequences of

leaving potentially mentally ill individual alone may have been irremediable, and officers may have been derelict in their duty it they had not taken her into custody). "It is a misguided application of §1983 to expose to liability those who by all objective indicia were only trying to help." Id.

Mr. Fisher contends that the deputies did not comply with standard police procedures, and has submitted materials from the Peace Officer Training Academy addressing how to deal with elderly, mentally ill and violent persons. Plaintiffs' Memorandum Contra, Exs. 1-3. However, none of these address how to deal with those types of individuals who are armed with a firearm. In contrast, plaintiffs' Exhibit 4 does address tactics to use when confronting an armed suspect. The actions of the officers were consistent with these guidelines.

Mr. Fisher also notes certain policy memoranda from the Morrow County Sheriff's office, included as Exhibit 5 to the memorandum contra, which contains such general advice as frisking a person only for weapons when the deputy has an articulable reason to fear for his safety, and using a level of force commensurate to the prevailing conditions or circumstances. These materials also contain guidelines on how to proceed where the deputies come into contact with a person believed to be mentally ill who represents an immediate or substantial risk of causing physical harm to himself or others. The steps include ascertaining from relatives if the person has a prior history of mental illness, whether a relative is willing to sign an affidavit for the purpose of admitting the person to a hospital, and taking the person into custody in as inconspicuous a

manner as possible and taking him to a medical center for an evaluation. Again, these guidelines do not address the procedure to be used when a person suspected of being suicidal is also armed with a firearm. Rather, the procedures referred to above for dealing with an armed individual would apply.

The evidence does not support Mr. Fisher's argument that the deputies in this case failed to comply with the applicable guidelines implemented by the Morrow County Sheriff's Department, and in any event, there is also no evidence that these general policy guidelines were intended to be inflexible and incapable of being adapted to the exigencies of unique situations. Further, even if it is assumed that the deputies violated some established police procedure, this alone would be insufficient to overcome a qualified immunity claim. Davis, 468 U.S. at 194 Russo v. City of Cincinnati, 953 F.2d 1036, 1044 (6th Cir. 1992).

The parties have submitted expert testimony on the issue of whether Mr. and Mrs. Alexander, acted reasonably under the circumstances. The defendants have submitted the report of Samuel D. Faulkner, a former deputy sheriff now employed with the Ohio Peace Officer Training Academy, who concluded that the deputies used reasonable and appropriate measures to address the situation before them. Defendants' Motion for Summary Judgment, Ex. C.

Mr. Fisher has submitted the report of Dr. Donald J: Van Meter, a former Ohio State Highway Patrol officer and presently a law enforcement consultant, who expresses the opinion that the deputies used excessive force under the circumstances in this case. Plaintiffs'

Memorandum Contra, Ex. 9. Mr. Van Meter had the benefit of hindsight when he reviewed the situation. He emphasizes factors which he claims indicated that Mr. Fisher posed no threat to the officers, while giving little or no weight to the factors which suggested the potential danger of serious harm. However, the fact that the-expert weighed these circumstances differently and disagreed with the officer's actions does not render the officer's actions unreasonable. Reynolds, 84 F.3d at 1170. The inquiry is not whether another reasonable or more reasonable interpretation of events can be constructed after the fact, but whether a reasonable officer could have believed that his conduct was justified, even though reasonable officers could disagree on the issue. Id. (holding that expert's disagreement with the steps officer took is not sufficient to raise a genuine issue of material fact regarding reasonableness of officer's conduct).

The court finds that the deputies did not use excessive force in addressing the perceived threat posed by Mr. Fisher's conduct Based on the largely undisputed facts, their actions were reasonable and did not violate Mr. Fisher's Fourth Amendment rights.

The court further finds that there is no evidence in the record which would support a finding that Sergeant Leary violated Mr. Fisher's constitutional rights in any way. He did not arrive at the scene until Mr. Alexander was already in the process of handcuffing Mr. Fisher. There is no evidence that he had any knowledge of or involvement in the earlier events. Upon his arrival at the scene, Sergeant Leary spoke with Mrs. Creswell, learned that Mr. Fisher had a heart condition, observed that he was in distress, and promptly removed the

handcuffs and called the squad personnel.

B. Reasonableness of Actions in Light of Established Law

Since this court has found that the actions of the deputies did not violate Mr. Fisher's constitutional rights, there is technically no need to address whether their actions were reasonable in light of clearly established law. However, this court notes that, even assuming the conduct of the deputies violated Mr. Fisher's constitutional rights, a reasonable officer in their position would not have been on notice that such conduct was clearly unlawful, in light of the established law at the time. Particularly in regard to the excessive force claim, the Supreme Court announced in Saucier v. Katz that the inquiries for qualified immunity and excessive force are distinct. Katz, 533 U.S. at 204.

The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense.

Graham does not always give a clear answer as to whether a particular application of force will be deemed excessive by the courts. This is the nature of a test

which must accommodate limitless factual circumstances. This reality serves to refute respondents' claimed distinction between excessive force and other Fourth Amendment contexts; in both spheres the law must be elaborated from case to case. Qualified immunity operates in this case, then, just as it does in others, to protect officers from the sometimes "hazy border between excessive and acceptable force ... and to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful.

Id., 533 U.S. at 205-06.

In Katz, the Supreme Court concluded that the officer who allegedly shoved a protester into a van upon his arrest at an event at which the Vice President was speaking was entitled to qualified immunity, where he did not know the full extent of the threat the protester posed to the Vice President or whether he had any confederates in the crowd.

Likewise, in this case, Mr. Fisher has not identified any case which demonstrates a clearly established rule prohibiting the deputies from acting as they did, and the circumstances disclose substantial grounds for the deputies to have concluded that they had legitimate justification under the law for actions as they did. See id., 533 U.S. at 208, 209. The deputy defendants are entitled to qualified immunity on Mr. Fisher's §1983 claim against them in their individual capacities.

III. Claim Against Sheriff Harden

Mr. Fisher has also asserted a claim under §1983 against Harden in his official capacity as sheriff of

Morrow County, Ohio for failing to adequately train, supervise and discipline his deputies. Since a suit against an individual in his official capacity is the equivalent of a suit against the governmental entity which employs that individual, Morrow County is the proper party to answer to these allegations. See Matthews v. Jones, 35 F. 3d 1046, 1049 (6th Cir. 1994).

The county may be held liable only if Mr. Fisher sustained -injuries which were the result of an unconstitutional policy or custom of the county. Monell v. Department of Social Services, 436 U.S. 658 (1978). Here, the evidence fails to establish that any violation of Mr. Fisher's Fourth Amendment rights occurred. Where, as here, the plaintiff has failed to show the existence of a genuine issue of material fact as to any of the asserted constitutional claims against the county employees, then summary judgment is appropriate as well on the custom and policy claim against the county. Ewolski, 287 F.3d at 516 (claim against municipality must be based on unconstitutional actions of its employees which inflicted a constitutional harm); City of Takoma Park, 134 F.3d at 272 (no municipal liability on failure to train claim where no constitutional violation was committed by officer in detaining person reasonably believed to be mentally ill).

Mr. Fisher's theory is that Sheriff Harden is a policy maker for the county for purposes of the training, supervision and discipline of the employees working under him. Even if it is assumed that a constitutional violation occurred here, Mr. Fisher must also show that Sheriff Harden adopted and followed certain policies which resulted in constitutional injury to him.

A. Failure to Train

In order to hold the county liable under §1983 for failure to train adequately, Mr. Fisher must prove that the training program for deputies is inadequate to the task an officer must perform, that the inadequacy is the result of deliberate indifference, and that the inadequacy is closely related to, or actually caused, his injury. City of Canton v. Harris, 489 U.S. 378, 390-91 (1989); Matthews, 35 F.3d at 1049.

Mr. Fisher argues that Mr. and Mrs. Alexander were not adequately trained to. handle the situation. He notes that Mrs. Alexander was an auxiliary deputy who voluntarily accompanied regular deputies on their shifts without pay to maintain her law enforcement certificate, and that Mr. Alexander had only been assigned to patrol for four or five months prior to this incident. However, the Constitution does not require that all police forces be comprised solely of twenty-year veterans with years of training and experience. Both these officers had completed the basic course of training for law enforcement officers in Ohio, which included some instruction on how to deal with persons who are suicidal. According to plaintiffs, expert, this training included twenty hours of stops and approaches training. While Mr. Van Meter offers the opinion that the basic training on search and seizure is inadequate, his report offers no view on whether the basic training on investigatory stops or dealing with mentally disturbed individuals was adequate, other than to comment that, in his view, threats to officers' safety were overemphasized in the training materials.

Mr. Alexander also trained under the supervision of

two sergeants for two months. Mr. Van Meter offers the opinion that this field training was inadequate. However, there is no evidence that any more thorough field training would have better prepared the deputies to handle this encounter. There is no evidence that suicide runs or even armed confrontations are a common occurrence in Morrow County. Mr. Alexander recalled only one other suicide run during his one-year tenure, a case which involved a woman who had overdosed on medication.

The sheriff's department had written guidelines on dealing with mentally ill persons and armed individuals. Even assuming that the deputies were not familiar with these policies, that fact alone does not establish that these policies were not enforced. Stemler v. City, of Florence, 126 F.3d 856, 865 (6th Cir. 1997) (unfamiliarity of defendant officers with policy manuals did not establish that county failed to ensure that officers complied with policies).

Allegations that a particular officer was improperly trained, or allegations that ,a particular injury could have been avoided with better training are insufficient to prove liability on the part of the county. Sova v. City of Mount Pleasant, 142 F.3d 898, 904 (6th Cir. 1998); Walker v. Norris, 917 F.2d 1449, 1456 (6th Cir. 1990) (failure to train on specific area of operation of unit doors in prison and use of mace did not render training program deliberately indifferent to rights of inmates; whether officers, training was the best and most comprehensive available has no bearing on failure to train claim). As the Supreme Court stated in Harris:

[T]he focus must be on the adequacy of the training

program in relation to the tasks the particular officers must perform. That a particular officer may be unsatisf actorily trained will not alone suffice to f asten liability on the city, for the officer's shortcomings may have resulted from factors other than a faulty training program. It may be, for example, that an otherwise sound program has occasionally been negligently administered. Neither will it suffice to prove that an injury or accident could have been avoided if an officer had better or more training, sufficient to equip him to avoid the particular injury-causing conduct.

Harris, 489 U.S. at 390-91.

In addition, "a plaintiff ordinarily cannot show that a [government entity] acted with deliberate indifference without showing that the [government entity] was aware of prior unconstitutional actions of its employees and failed to respond." Stemler, 126 F.3d at 865 (citing Board of County Commissioners of Bryan County; Oklahoma v. Brown, 520 U.S. 397 (1997)). There is no evidence of any other instances of alleged violations of citizens' Fourth Amendment rights, prior to or subsequent to the incident in this case, by Mr. and Mrs. Alexander or any other deputy in Morrow County. See Sova, 142 F.3d at 904 (fact that shooting of mentally disturbed individual was only the second time that police officers had used deadly force against a citizen "belies any claim that the city was deliberately indifferent to the safety of its citizens.")

The evidence in the record fails to demonstrate that a jury could find in Mr. Fisher's favor on the failure to train claim.

B. Failure to Supervise

To establish a claim for improper supervision, plaintiff must show that the supervisor encouraged the specific incident of misconduct or in some other way directly participated in it. Sova, 142 F.3d at 904; Hall v. Shipley, 932 F.2d 1147, 1154 6th Cir. 1991). Plaintiff must show at a minimum that the official at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers. Comstock v. McCrary, 273 F.3d 693, 713 (6th Cir. 2001). When the plaintiff alleges supervisory liability based on a failure to supervise, the plaintiff must show that the failure to supervise amounts to deliberate indifference on the part of the supervisory officials. Ronayne v. Ficano, 173 F.3d 856 (unpublished) , 1999 WL 183479 (6th Cir. 1999) (citing Harris, 489 U.S. at 388). Here, there is no evidence that Sheriff Harden participated in any way in the incident involving the plaintiffs. There is no evidence that he ever ignored or tolerated unconstitutional conduct by the deputies under his supervision. No evidence has been presented that Sheriff Harden ever received any citizen complaints regarding any other alleged unconstitutional conduct on the part of Mr. and Mrs. Alexander either before or after this incident. The record fails to demonstrate that Mr. Fisher could establish a claim based on failure to supervise.

C. Failure to Discipline

The failure: to investigate and discipline, where appropriate, may give rise to §1983 supervisory liability. Walker, 917 F.2d at 1457. However, this liability arises where no serious investigation is

conducted. See Marchese v. Lucas, 758 F.2d 181, 188 (6th Cir. 1985). Further, a governmental entity is subject to liability for failing to act on complaints of misconduct by police officers only if it had a policy or custom of failing to act upon prior similar complaints of unconstitutional conduct. Andrews v. Fowler, 98 F.3d 1069, 1074-75 (8th Cir. 1996). See also Brown v. Shaner, 172 F. 3d 927, 931 (6th Cir. 1999) (city not liable where plaintiffs produced no evidence that city, on present occasion or in the past, failed to investigate and discipline the use of excessive force by its police personnel where such discipline was justified). A plaintiff must also establish that the failure to investigate misconduct or to discipline in the past was the "moving force" behind the plaintiff's injury.Searcy v. City of Dayton, 38 F.3d 282, 287 (6th Cir. 1994).

Here, there is no evidence that Sheriff Harden had a custom or policy of failing to investigate or discipline the deputies under his supervision, nor is there any evidence that previous citizen complaints regarding alleged misconduct on the part of officers were disregarded. In this case, Sheriff Harden conducted a thorough investigation into the incident, included as Exhibit B to defendants' motion for summary judgment. This investigation includes the radio log for the date in question, the incident report, diagrams and photographs of the scene, and interviews with the officers, squad members, other persons at the scene, the persons :who made the 9-1-1 report, the UPS truck driver who also observed Mr. Fisher that day, and Mr. Fisher. Sheriff Harden also sent the investigation file to Greg Perry, the prosecuting attorney for Morrow County, to review and comment on any misconduct or criminal violations on the part of the deputies. He also

contacted CSX Railroad and determined that Mr. Fisher did not have the consent of the railroad to be hunting on Railroad property. n4 Thus, the record reveals that Sheriff Harden appropriately investigated the incident. See Walker, 917 F.2d at 1457 (finding no liability for failure to investigate where prison stabbing was investigated, and findings were included in an incident report which was reviewed with associate warden and submitted to district attorney and disciplinary board). The record discloses no grounds for liability based on a failure to investigate.

The court concludes that a jury could not reasonably find in Mr. Fisher's favor on his claim under §1983 against Sheriff Harden in his official capacity based on failure to train, supervise and discipline, and that no genuine issue of material fact has been shown to exist in that regard.

IV. Conclusion

In accordance with the foregoing, defendants' motion for summary judgment on the §1983 claims of Mr. Fisher is granted Plaintiffs' cross-motion for summary judgment on those claims is denied.

Defendants have not moved for summary judgment on plaintiffs, state law claims. However, now that the court has concluded that defendants are entitled to summary judgment on the federal claims, this court may decline to exercise jurisdiction over the state law claims. See 28 U.S.C. §1367(c)(3); Saglioccolo v. Eagle Ins. Co., 112 F. 3d 226 (6th Cir. 1997); Valot v. Southeast Local School Dist. Bd. of Educ., 107 F.3d 1220 (6th Cir. 1997). Indeed, "'if the federal claims are

dismissed before trial, ... the state claims [generally] should be dismissed as well.'" Taylor v. First of America Bank-Wayne, 973 F.2d 1284, 1287 (6th Cir. 1992) (quoting United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966)).

This court is mindful of the need to weigh the interests of judicial economy and avoidance of multiplicity of litigation against the threat of needlessly deciding state law claims. See Landefeld v. Marion General Hosp., Inc., 994 F.2d 1178, 1182 (6th Cir. 1993). However, these claims may potentially raise novel and complex issues of state law, particularly if the officers pursue the statelaw immunity defense they have advanced in their answer. See 28 U.S.C. §1367(c)(1). The court declines to exercise supplemental jurisdiction over plaintiffs' state law claims under §1367.

The clerk is directed to enter, final judgment in favor of the defendants on the §1983 claims. The plaintiffs' state law claims are dismissed without prejudice.

/s/
James L. Graham
United States District Judge

Date: August 6, 2002

Footnotes

n1 Mr. Fisher also asserted a claim for failure to provide prompt medical care in his complaint. However, this claim was later dismissed by stipulation on July 1, 2002.

n2 Mr. Fisher was also observed by Eugene Ebert, a UPS driver who was making a delivery to the Creswell residence. Mr. Ebert had never seen anyone sitting on the tracks before and thought that this was unusual, but was informed by Mr. Creswell that Mr. Fisher was hunting groundhogs.

n3 There is conflicting evidence as to whether, at one point, Mr. Fisher bent down as though picking up something off the tracks. However, Mr. Alexander saw nothing in Mr. Fisher's hands at that point, and this event, even if it occurred, is not significant to the court's analysis of the issues.

n4 Hob Copelin, Special Agent for the CSX Police Department responded to Sheriff Harden's inquiry in a letter dated July 13, 2000, noting the CSX has a "zero tolerance policy with regards to trespassing on railroad property" but that they would not be prosecuting Mr. Fisher on this occasion due to his age and medical condition. He further commented about the dangers associated with responding to a call of a possible suicide, and that "railroad tracks are frequented by persons engaging in criminal activity, persons with mental disabilities, persons under the influence of alcoholic beverages or drugs, and by violent criminals." He commended the performance of the deputies in responding to this situation, as well as the thoroughness of the investigation by the Sheriff's Department.

No. 02-3996

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILLIAM E. "BUSTER" FISHER, et al.,
Plaintiffs-Appellants,

v.

TOM E. HARDEN, in his official capacity as Sheriff of Morrow County, Ohio, et al.,
Defendants-Appellees.

June 8, 2005, Filed

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JUDGES: BEFORE: KEITH, CLAY, and GIBBONS, Circuit Judges.

OPINION: ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only

to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Gibbons would grant rehearing for the reasons stated in her dissent.

ENTERED BY ORDER OF THE COURT

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Supreme Court, U.S.
FILED
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05-325

IN THE

Supreme Court of the United States

TOM E. HARDEN, ET AL.,

Petitioners,

v.

WILLIAM E. "BUSTER" FISHER, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Respondents William E. "Buster" Fisher and Doris Fisher oppose the Petition for a Writ of Certiorari. Petitioners seek review of Sixth Circuit Court of Appeals dicta completely unnecessary to the ultimate disposition of this case. Further, the actual decision of the Sixth Circuit Court of Appeals below is neither in conflict with any decision of another United States court of appeals, nor did the court of appeals decide an important federal question in a way that conflicts with relevant decisions of this Court.

The Sixth Circuit held that, taking the facts on the summary judgment motion in the light most favorable to respondents, the plaintiff Buster Fisher had been arrested by petitioners without probable cause to believe either that he had committed a crime or that he was a danger to himself or others. (Pet. 11a-12a) The proposition that probable cause is required for a seizure of the person that constitutes an arrest, whether on criminal charges or in connection with a mental health assessment, is well established.

Petitioners do not seek review of this holding, but rather seek a writ of certiorari on only one question, relating to a matter addressed in dictum by the Sixth Circuit:

> Whether under the Fourth Amendment police officers detaining an individual who poses a danger to himself or others, who is believed to be armed and suicidal, must have probable cause to detain the individual, as opposed to *Terry's* reasonable suspicion standard. (Pet. i)

Petitioners do not challenge the proposition that probable cause is required when such a detention ripens into an arrest, nor have they raised any question of whether the Sixth Circuit properly concluded that the detention of Buster Fisher had

ripened into an arrest in this case. The latter issue would, in any event, present at most a question of whether the court below had made erroneous factual findings or misapplied a properly stated rule of law, and would not provide an appropriate basis for the issuance of a writ of certiorari. The question petitioners have raised would not dispose of this case and certiorari should not be granted to address it.

STATEMENT OF THE CASE

The statement of facts in the petition does not take the facts in the light most favorable to respondents, the party opposing summary judgment. The facts are appropriately described in the decision of the Sixth Circuit (Pet. 3a-5a, 10a-11a) and may be summarized as follows.

Buster Fisher, a seventy-seven-year-old retired farmer, had gone out to shoot groundhogs, an activity in which he routinely engaged to help protect his neighbors' crops. He positioned himself on an elevated railroad grade on his neighbor's property. A passerby noticed him, assumed that he was possibly suicidal and telephoned the Sheriff's Department.

Respondents Deputies Stephen Alexander and Molly Alexander came to the scene and observed Fisher who was seated in a folding chair approximately 250 yards away. Mr. Alexander used the cruiser's speaker system to instruct Fisher to come toward the officers. Fisher stood up, gathered his belongings, and began walking along the railroad tracks toward the officers. The officers noticed he was carrying a rifle slung over his shoulder. They drew their firearms, crouched behind their open cruiser doors, and ordered Fisher to lay down the rifle before coming any closer. As the officers acknowledged, initially Fisher appeared unable to hear their first command, and they responded with additional

instructions for him to lay down his rifle. Upon hearing their command at a distance of nearly 200 yards away, Fisher readily complied with their request. The officers instructed Fisher further to lay down his folding chair and a tripod he was carrying. Again, once Fisher could hear their request, he readily complied.

For the next couple of minutes, the officers observed Fisher walk toward the road, with nothing in his hands. It became apparent that Fisher was an older gentleman. The officers conceded that he approached them in a normal fashion and did not say or do anything out of the ordinary. Nonetheless, they kept their weapons drawn and trained upon him. As Fisher arrived at the road, Mr. Alexander directed him to walk backwards toward Mrs. Alexander, which he did.

Fisher had not done anything that the officers considered to be suspicious or threatening. Fisher was never verbally threatening, abusive, or irrational; he did not make any statements about hurting himself or anyone else; and he never attempted to avoid the officers or flee the area. Both officers admitted that Fisher did not do anything that made them afraid. The officers did not question Fisher to determine if he was depressed or suicidal and in fact made no inquiry of him at all. Nonetheless, the officers commanded Fisher, still at gunpoint, to lay face down on the roadway, and handcuffed him behind his back.

Fisher immediately went into cardiac arrest. After unsuccessfully attempting to stand Fisher on his feet, the officers left him handcuffed and lying on the ground. Mr. Alexander went to retrieve the objects that Fisher had placed on the ground. Shortly thereafter, a woman who lived nearby and another Deputy, Mark Leary, separately arrived at the scene. The woman, who had been unable to get the Alexanders' attention, informed Leary that Fisher suffered from a heart condition. Leary, observing

Fisher's distressed state, removed the cuffs, turned him on his back and called for medical assistance. Fisher was flown to a hospital for emergency care. He is permanently disabled as a result of the incident.

ARGUMENT

I. THE PETITION FOR CERTIORARI DOES NOT SEEK REVIEW OF THE HOLDING OF THE COURT BELOW.

The petition is premised on the misleading statement that the "Sixth Circuit's primary error was to hold that the ... officers did not have a right to conduct a pat-down or *Terry* stop of Buster Fisher, absent probable cause ..." (Pet. 8) This was not the holding of the Sixth Circuit, and respondents' claim was not based on the argument that officers had conducted an improper "pat-down or *Terry* stop" of Buster Fisher. Respondents' claim was that Fisher had been subjected to an *arrest* in violation of his constitutional rights. (Pet. 6a)

The Sixth Circuit was not required to determine in this case what standard would apply to an investigatory detention for mental health reasons that stopped short of an arrest. Some of the language in the opinion below suggests that, if it had been presented with the question, it might not apply the reasonable suspicion standard of *Terry v. Ohio*, 392 U.S. 1 (1968), to such detentions. This, however, was dictum, as the opinion itself makes clear. The court concluded:

> The Defendants urge us to adopt a rule that would apply the law of *Terry v. Ohio* to mental health seizures. Based on our precedent, we decline to do so, *but such a rule would not apply to this case in any event.* Even assuming,

> *arguendo*, that as part of an investigatory detention officers were permitted to physically restrain a detainee in order to assess his mental state (and all in the absence of a reasonable suspicion of criminal conduct), this rule would not apply in the instant case because the force used by the Alexanders elevated their seizure of Fisher from a mere investigatory stop to an arrest. (Pet. 11a-12a) (emphasis added)[1]

The court concluded that "the encounter here began as an investigatory stop incident to a suicide report. Nevertheless, in light of Fisher's compliance and because he did not take any sudden, unpredictable, or threatening action toward the officers, it is abundantly apparent that the seizure of Fisher quickly elevated into a full arrest." (Pet. 13a)

The Sixth Circuit correctly based this decision on "whether the use of force was reasonably related in scope to the situation at hand," whether "the length and manner of [the] investigative stop [was] reasonably related to the basis for the initial intrusion," and on this Court's instruction that, "the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Florida v. Royer*, 460 U.S. 491, 500 (1983). (Pet. 12a) In order for the decision below to be reversed, it would be essential for petitioners to argue that the fact bound decision that Fisher had been arrested was

---

[1] The precedent to which the court made reference was *Monday v. Oullette*, 118 F.3d 1099 (6th Cir. 1997). It is noteworthy that *Monday* was a case where officers used pepper spray to forcibly take the plaintiff into protective custody and then transported him to a hospital for a mental health evaluation. The court correctly held that probable cause was required for such a seizure. Thus neither in the instant case nor in *Monday* was the Sixth Circuit confronted with an investigatory detention that stopped short of arrest.

wrong. Petitioners, however, have not raised any question as to whether the Sixth Circuit correctly held that the detention of plaintiff Fisher had ripened into an arrest and thus certiorari cannot be granted on this issue. Rule 14 (1) (a), Rules of the Supreme Court.

II. THE SIXTH CIRCUIT DECISION DOES NOT CONFLICT WITH DECISIONS OF THIS COURT, NOR DOES IT CREATE A SPLIT AMONG THE CIRCUITS.

The Sixth Circuit decision does not conflict with this Court's use of the reasonable suspicion standard in *Terry*, because the court concluded that this was not a mere investigative detention, but that it had ripened into a full arrest. Nor is the decision in conflict with the other rulings of this Court cited by petitioners, *Minnesota v. Dickerson*, 503 U.S. 366 (1993) and *Adams v. Willams*, 407 U.S. 143 (1972). *Dickerson* involved a *Terry* stop where defendant did not challenge the police justification to stop and frisk him for weapons, but rather whether the officer was entitled to seize piece of crack cocaine he felt in defendant's jacket, despite the fact that he had not believed it to be a weapon. *Adams* stands only for the proposition that "When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others,' he may conduct a limited protective search for concealed weapons." 407 U.S. at 146.

Petitioners incorrectly argue that the Sixth Circuit decision creates a conflict with *Pena v. Leombruni*, 200 F.3d 1031 (7th Cir. 1999), *Wood v. Lakeland*, 203 F.3d 1288 (11th Cir. 2000), *Nelson v. County of Wright*, 162 F.3d 986 (8th Cir. 1998) and *United States v. Wallace*, 889 F.2d 580 (5th Cir. 1989). Petitioners characterize

these decisions as standing for the broad proposition that it is unnecessary "to consider the mental state of the suspect when considering the reasonableness of a police officer's actions," and that there is no "heightened standard of care for officers dealing with suicidal individuals."[2] The cited cases do not address when an emotionally disturbed person can be arrested, but in fact stand for far more limited propositions concerning the excessive use of force. See, *Pena* (plaintiff failed to establish record that failure to train specifically on use of force against dangerous people who appear to be irrational amounted to deliberate indifference); *Wood* (officer was objectively reasonable in firing from six to eight feet at deceased who was threatening him with a box-cutter and moving toward officer in a small room)[3]; *Nelson* (use of deadly force was objectively reasonable by officer who was struggling with suicidal person who resisted handcuffing and attempted to take officer's gun); *Wallace* (criminal appeal in which officers responded to domestic disturbance and were told by the woman at the scene that the man had a gun and was threatening suicide – court held that officers were entitled to frisk the man for a weapon). These decisions simply did not address the question that resolved this case in the Sixth Circuit.

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[2] Phrased this broadly the propositions suggested by Petitioner would conflict with this Court's instruction that Fourth Amendment seizures must be reviewed against the "totality of the circumstances." *Graham v. Connor*, 490 U.S. 386, 396 (1989). See, Michael Avery, "Unreasonable Seizures of Unreasonable People: Defining the Totality of Circumstances Relevant to Assessing the Police Use of Force Against Emotionally Disturbed People," 34 Columbia Human Rts. L.R. 261 (2003).

[3] Whatever *Wood* may imply about the relevance of the emotional condition of the subject in use of force cases has been superseded by *Mercado v. City of Orlando*, 407 F.3d 1152, 1155, 1158 (11th Cir. 2005) (court considers alternative of utilizing a crisis negotiation team in determining reasonableness of force against suicidal person).

The cases which Petitioners erroneously cite as consistent with the court below also addressed claims of excessive force rather than the standards for *Terry* stops or arrests of emotionally disturbed people. *Ludwig v. Anderson*, 54 F.3d 465, 472 (8th Cir. 1995) (jury could find that use of deadly force against decedent was objectively unreasonable, under circumstances present and considering the emotional state of decedent and training officers had received on handling emotionally disturbed persons); *Deorle v. Rutherford*, 272 F.3d 1272 (9th Cir. 2001) (objectively unreasonable for officer to fire a lead-filled "beanbag round" into face of unarmed emotionally disturbed man who was walking toward officer).

There is no division among the Circuit Courts of Appeal on the issue that was essential to the resolution of this case below, the standard that determines when police officers may arrest a person they suspect to be emotionally disturbed on the ground he is dangerous to himself or others. There is agreement that probable cause is required when a brief investigatory detention ripens into an arrest. See, *Sullivan v. County of Hunt, Tex.*, 106 Fed.Appx. 215, 218 (5th Cir. 2004); *Bailey v. Kennedy*, 349 F.3d 731, 739 (4th Cir.2003); *Anthony v. City of New York*, 339 F.3d 129, 137 (2d Cir.2003); *Maag v. Wessler*, 960 F.2d 773, 775 (9th Cir.1992); *Chathas v. Smith*, 884 F.2d 980, 987 (7th Cir.1989); *In re Barnard*, 455 F.2d 1370, 1373 (D.C.Cir.1971).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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2

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No. 05-325

IN THE

Supreme Court of the United States

TOM E. HARDEN, ET AL., PETITIONERS

v.

WILLIAM E. "BUSTER" FISHER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF AMICUS CURIAE THE NATIONAL FRATERNAL ORDER OF POLICE IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*

Amicus Curiae, the National Fraternal Order of Police, respectfully submits this brief in support of the petition for writ of certiorari to the Sixth Circuit.[1]

Pursuant to Rule 37(2)(a) of the Rules of this Court, the National Fraternal Order of Police ("FOP") submits that it has requested and received consent from Petitioners and Respondent for the filing of this *amicus curiae* brief. Consent by Petitioners and Respondent is attached hereto and accompanies this brief.

The National Fraternal Order of Police (hereinafter referred to as "FOP") was formed in 1917 and currently consists of more than 2,100 lodges across the country and over 321,000 members in the United States. The FOP has become the largest professional police organization in the country. The FOP has formed a tradition of police officers representing police officers with the goal of bettering their profession and those who choose to protect and serve our communities, our states, and our country. The FOP strives to increase the public confidence toward the police to the benefit of the peace and the public.

This case concerns a safety stop conducted by Morrow County, Ohio police officers of an individual believed to be suicidal, who was armed with a high-

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[1]Pursuant to Supreme Court Rule 37.6, *amicus curiae* state that counsel for petitioners participated in the drafting of this brief and made a monetary contribution to the preparation and submission of this brief.

powered rifle and refused to obey officer commands. Rather than applying a reasonable suspicion standard to the stop, the Sixth Circuit held that the officers were required to have probable cause to conduct the stop because the man was suicidal. The standard for police officers to stop an individual believed to pose a threat to himself or others is, and should remain, a reasonable suspicion. This standard should not teeter on whether or not that individual has a questionable mental state or is suicidal.

Amicus Curiae has a substantial interest in supporting the petition for certiorari because the appellate court's decision holding that police officers are required to have probable cause to conduct a search of an armed and suicidal individual who poses a threat to himself or others unreasonably limits the ability of a police officer to protect himself and others. Further, the appellate court's decision conflicts with this Court's ruling in *Terry v. Ohio*, 392 U.S. 1 (1968), and will, if left standing, require police officers to (1) make split-second decisions regarding whether an individual who poses a threat to himself or others is suicidal, and (2) then make a decision as to whether the officer has probable cause as opposed to reasonable suspicion, resulting in profound consequences for the safety of the people of this country. This brief will discuss some of the consequences of creating a heightened standard for police officers stopping individuals who are believed to be suicidal or have a disturbed mental state.

SUMMARY OF THE ARGUMENT

This case, if not corrected by this Court, burdens police officers with a requirement that they apply different standards (reasonable suspicion vs. probable cause) to suspects posing a threat or danger to themselves or others. The standard used is determined by the mental state of the suspect.

The Sixth Circuit's decision requires a police officer, when presented with an individual who is armed and posing a threat to himself or others, to determine whether that person is suffering from a mental health disorder, or, alternatively, is about to engage in criminal conduct. If it is because of the former, the officer must have probable cause to search the individual. If it is the latter, the police officer must have a reasonable suspicion.

This Court's decision in *Terry v. Ohio*, 392 U.S. 1 (1968) made it clear that the purpose of allowing a police officer to search an individual for weapons was not merely an interest in investigating crime, but rather, a more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him. *Terry v. Ohio*, 392 U.S. at 24. See also *Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993); *Adams v. Williams*, 407 U.S. 143, 147 (1972). It should not matter whether the armed person is suicidal or has a questionable mental state, and to require a police officer to make a split-second determination of such is unreasonable and compromises the safety of the people the police protect.

In addition to the incorrect decision of the Sixth Circuit, the Eighth and Ninth Circuits conclude that the mental state of the individual being detained or arrested is relevant to the reasonableness of a police officer's actions. See *Ludwig v. Anderson*, 54 F.3d 465 (8th Cir. 1995); *Deorle v. Rutherford*, 272 F.3d 1272 (9th Cir. 2001). This creates a serious circuit split, as at least four circuits have held that the mental state of a suspect is irrelevant when considering the reasonableness of a police officer's actions in dealing with an individual who may be armed and do not require a heightened standard of care for officers dealing with suicidal individuals. See *Wood v. City of Lakeland*, 203 F.3d 1288 (11th Cir. 2000); *Pena v. Leombruni*, 200 F.3d 1031 (7th Cir. 1999); *Nelson v. County of Wright*, 162 F.3d 986 (8th Cir. 1998); and *United States v. Wallace*, 889 F.2d 580 (5th Cir. 1989). This split among the circuits is significant and requires that this Court accept this case on writ of certiorari.

The Sixth Circuit has done more than just misapply the facts of the underlying case to the law of this Court; it has changed this Court's law, as outlined in *Terry v. Ohio*, for situations where police officers are making a *Terry* stop of mentally-disturbed individuals. The Sixth Circuit has unreasonably limited the ability of a police officer to protect himself and others, and therefore, its decision should be reversed.

ARGUMENT

I. When Police Officers Receive Specific Information Indicating That A Person Has A Weapon, There Is Justification For A Pat Down Search, Regardless Of The Mental State Of The Individual.

This Court was clear in *Adams v. Williams*, that when a police officer receives specific information indicating that a person has a weapon, there is justification for a pat down search. *Adams v. Williams*, 407 U.S. 143 (1972). An officer is justified in conducting a pat down search regardless of the mental condition of the individual and regardless of whether the individual is believed to be engaged in or about to be engaged in criminal conduct. Indeed, as this Court explained in *Terry*, 392 U.S. at 13, "[e]ncounters are initiated by the police for a wide variety of purposes, some of which are wholly unrelated to the desire to prosecute for crime." Further, the fact that an officer may not suspect an individual of criminal activity does not render such a seizure unreasonable per se as *Terry* only requires "specific and articulable facts which...reasonably warrant [an] intrusion" into the individual's liberty. *Terry*, 392 U.S. at 21.

The Sixth Circuit made several errors in its decision. First, the Sixth Circuit concluded that the officers did not suspect criminal activity, and therefore, the officers were not justified in conducting a *Terry* stop of an individual armed with a high-powered rifle. Second, the Sixth Circuit concluded that an officer must have probable cause, not a reasonable suspicion, to seize a person believed to pose a danger to himself or

others when that person is believed to be suicidal. This decision significantly alters the law of this Court, as discussed above, in that now police officers are required to make a mental health determination before they are ever able to conduct a stop of a person posing a danger, so that the police officer knows whether or not they must have a reasonable suspicion or a probable cause. This law surely cannot stand, as to require officers to make such difficult split-second decisions unreasonably limits the ability of a police officer to protect himself and others.

A. Danger To Safety Of Police Officers.

Police officers are already required to make difficult split-second decisions in their critically important jobs. Requiring a police officer to determine the mental health of an individual before making a stop, however, is unreasonable and places the police officer's safety in extreme jeopardy. The fact is that the Sixth Circuit's decision gives more protection to the mentally-disturbed, requiring a police officer to have probable cause to stop an armed mentally-disturbed individual, but only reasonable suspicion to stop an armed person without mental instability. Such a rule is nonsensical.

The safety of police officers is a growing concern requiring that the already heavy burden of a police officer's duties not be multiplied by decisions like the Sixth Circuit's. During the years 1994-2003, 616 police officers were feloniously killed. See "Law Enforcement Officers Killed & Assaulted," Printed by Federal Bureau of Investigation, U.S. Department of Justice, Washington, D.C. 20535, page 18 (Nov. 2004). A

staggering 571,358 police officers were assaulted. Id. Of the 616 police officers feloniously killed, 14 were handling mentally deranged assailants. Id. Of the 571,358 police officers assaulted, 9,142 were handling mentally deranged assailants. Id.

With such a huge number of police officers killed and assaulted, and a surprising number of those resulting from the handling of mentally deranged assailants, it is deeply concerning that the Sixth Circuit has issued a decision that offers greater protection to mentally-disturbed individuals than to those without mental health concerns. This Court must reverse the Sixth Circuit to correct this great error.

B. Greater Constitutional Rights To Mentally-Disturbed Individuals.

In the underlying case, police officers arrived in response to a 9-1-1 call of an alleged attempted suicide to find a man sitting in the middle of railroad tracks holding a high-powered rifle. The deputies knew nothing about this man other than he was apparently attempting to commit suicide. The deputies took cover behind their police cruiser and instructed the man over the PA to lay down his rifle. The man ignored the deputies and instead began walking toward the deputies with his rifle in hand. Eventually, after the third or fourth command, the man dropped his rifle but bent down and picked something else up. As the man approached the officers, deputy Steve Alexander saw firearm shells or ammunition protruding from the man's clothes and did not know if the man had another firearm on him. The man, "Buster" Fisher, was taken off the railroad tracks, handcuffed, and told to lay down

for a brief period of time so that the officers could search him for weapons. The man went into cardiac arrest and medical assistance was immediately rendered. This was clearly a legal *Terry* stop, engaged to ensure the safety of police officers and others.

Despite this Court's clear rule in *Adams*, *Terry*, and others, the Sixth Circuit found that the above investigation stop violated the constitution. Even though "Buster" Fisher was armed and ignoring police officer commands, the Sixth Circuit said that because the police officers did not suspect Fisher was engaged in or about to be engaged in a crime, the officers were required to have probable cause to restrain the man because he was suicidal. This law changes existing Supreme Court precedence and requires a heightened burden for officers searching and seizing mentally unstable or suicidal suspects. The result is that mentally unstable individuals are provided a higher level of constitutional protection than those without mental instability. In other words, the general public is less protected from armed and mentally unstable individuals than everyone else. This result is clear error and the Sixth Circuit must be reversed.

The Sixth Circuit has done more than just misapply the facts of the underlying case to the law of this Court; it has changed this Court's law, as outlined in *Terry v. Ohio*, for situations where police officers are making a *Terry* stop of mentally-disturbed individuals. This case will, if left standing, require police officers to (1) make split-second decisions regarding whether an individual who poses a threat to himself or others is suicidal, and (2) then make a decision as to whether the officer has probable cause as opposed to reasonable

suspicion, resulting in profound consequences for the safety of the people of this country. The Sixth Circuit has unreasonably limited the ability of a police officer to protect himself and others, and therefore, its decision should be reversed.

CONCLUSION

For the foregoing reasons, the FOP respectfully requests that this Court grant the petition for writ of certiorari and reverse the Sixth Circuit Court of Appeals.

Respectfully submitted,

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